Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 66
Petitioner,

v.

HOUSTON LIGHTING AND POWER COMPANY, a Subsidiary of HOUSTON INDUSTRIES, INC., as successor in interest to UTILITY FUELS, INC.

On Petition For Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit
No. 94-20693

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. The fundamental question presented for review by this case is whether or not the United States Court of Appeals for the Fifth Circuit has issued a Decision in direct conflict with long-standing precedent of this Court by virtue of the manner in which the Fifth Circuit went about analyzing and resolving the question of whether or not an underlying Arbitration Award should be enforced or vacated?

2. This case presents the corresponding question for review as to whether or not the United States Court of Appeals for the Fifth Circuit, under the guise of determining whether or not an Arbitrator "exceeded his authority" in issuing an Arbitration Award under a Collective Bargaining Agreement, in effect exceeded its authority, and thereby usurped the authority of the Arbitrator?

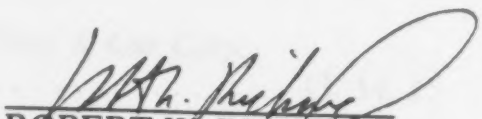
3. This case also presents for review the question of whether or not a Federal Court should, in considering the question of whether to enforce or vacate an Arbitration Award arising out of a Collective Bargaining Agreement, indulge in extensive analysis of the Collective Bargaining

Agreement, including the contractual provisions involved in the underlying Arbitration Award, or whether the Court should in fact limit its analysis to a consideration of the question of whether the Award "draws its essence" from the Collective Bargaining Agreement, and limit its contractual review to only such part of the Collective Bargaining Agreement that addresses the authority of the Arbitrator?

LIST OF ALL PARTIES

The undersigned counsel of record certifies that the following listed parties have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

HOUSTON LIGHTING & POWER CO.	- Respondent
HOUSTON INDUSTRIES, INC.	- Parent Company
UTILITY FUELS, INC.	- Respondent
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 66	- Petitioner
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO	- Parent Organization
SAM THORNAL	- Grievant



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LIST OF OPINIONS

1. Decision issued on December 11, 1995 in *Houston Lighting & Power Company vs. The International Brotherhood of Electrical Workers, Local Union No. 66*, No. 94-20693 in the United States Court of Appeals for the Fifth Circuit.

2. Order denying Petition for Rehearing issued on January 8, 1996, in *Houston Lighting & Power Company vs. The International Brotherhood of Electrical Workers, Local Union No. 66*, No. 94-20693 in the United States Court of Appeals for the Fifth Circuit.

3. Final Order issued by Judge Norman W. Black on August 25, 1995, in *Houston Lighting & Power Company vs. The International Brotherhood of Electrical Workers, Local Union No. 66*, Civil Action No. H-94-908 in the United States District Court for the Southern District of Texas, Houston Division.

4. Arbitration Award issued by Arbitrator Otis H. King on December 31, 1993 in No. A 70 300 0033 93; *Utility Fuels, Inc. -and- International Brotherhood of Electrical Workers, Local 66, AFL-CIO.*

STATEMENT OF JURISDICTION

This case seeks the review of a Decision of the United States Court of Appeals for the Fifth Circuit entered on December 11, 1995. The Petitioner filed a timely Petition for Rehearing, which Petition was denied on January 8, 1996. The underlying lawsuit was originally instituted in the United States District Court for the Southern District of Texas, under the auspices of Section 301 of the Labor Management Relations Act, 29 U.S.C. §185, seeking to set aside an Arbitration Award issued through the operation of a grievance procedure contained within a Collective Bargaining Agreement. This being a case instituted under the Labor Management Relations Act, seeking to set aside an Arbitration Award, it is one over which the Federal Courts have jurisdiction in the first instance, and over which this Court has jurisdiction to review by Writ of Certiorari.

APPLICABLE STATUTES

1. Section 301 of the Labor Managment Relations Act, 29 U.S.C. §185 (See Appendix 5).
2. Section 203(d) of the Labor Management Relations Act, 29 U.S.C. §173(d) (See Appendix 6).

STATEMENT OF THE CASE

This case seeks the review of a decision of the United States Court of Appeals for the Fifth Circuit reversing and vacating a Judgment of the United States District Court for the Southern District of Texas enforcing an Arbitration Award. The Fifth Circuit Decision also, in effect, vacated the underlying Arbitration Award, rendered as a result of Arbitration proceedings held between the two parties to a Collective Bargaining Agreement, one of them being the Petitioner, International Brotherhood of Electrical Workers, Local Union No. 66.

In the late Winter and early Spring of 1992, Houston Lighting & Power Company and its sister Company, Utilities Fuels, Inc. both subsidiaries of Houston Industries, Inc., undertook and effectuated a very significant layoff of employees. A significant number of the employees laid off by both Companies were covered by Collective Bargaining Agreements then in effect between the Petitioner, International Brotherhood of Electrical Workers, Local No. 66, and the two

Companies.[1] The two Companies devised a method of selecting the individuals covered by the Collective Bargaining Agreements for layoff which the Companies contend complied with the applicable contract language. With regard to the selection of employees for layoff, the Agreement between Utilities Fuels and Local 66 provided, in pertinent part, as follows:

> "Section 7. Seniority. After completion of probationary period, seniority shall date from the first date of employment by the Company at that facility, except where an employee resigns or is discharged for just cause and is later re-employed, then seniority shall date from the last date of employment at that facility. In the event of promotions, layoffs, or a permanent reduction in the working force at a facility,

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[1] The Petitioner Union was party to separate Collective Bargaining Agreements with Houston Lighting & Power and Utilities Fuels. However, the operative language relevant to the issues presented to the Arbitrator, and the proceeding before this Court, was substantively identical, and the manner in which the two Companies went about conducting the layoff, related to this contractual language, was also substantively identical.

where ability, skill and qualifications are equal, length of service at that facility shall govern. Employees covered by this Agreement who are laid off will be given first consideration for re-employment for positions covered by this Agreement, subject to the Company's determination of ability, skills and qualifications, for a period of one year after the layoff effective date. When Company determines to transfer employees form one location to another, Company will request volunteers and select the senior volunteers where ability, skill and qualifications are equal; if there are not sufficient volunteers with the required ability, skill and qualifications, Company will select the employees with the least seniority where ability, skill and qualifications are equal. The Company shall determine ability, skill and qualifications subject to an employee's right to assert a grievance under Article II."

Substantively identical language was contained in the Petitioner Union's Contract with Houston Lighting &

Power. The two Companies, in determining which employees to select for layoff, devised a scheme whereby every member of the Bargaining Unit was evaluated by Management, through the utilization of a "Special Performance Profile", and then, based upon the results of the evaluation, each employee was placed in one of three categories: "Above Average", "Average", or "Marginal". Employees were then selected for layoff utilizing seniority within each classification or grade, so that employees first in the "Marginal" category were laid off, in inverse order of seniority, and then, if necessary, employees in the "Average" category, and so on.

As a result of the manner in which employees were selected for layoff, the Petitioner Union filed a large number of Grievances against the two employers on behalf of laid off employees, contending, essentially, that their selection for layoff violated the Collective Bargaining Agreement, and these employees' seniority rights under the Agreement. One of the employees for whom the Union filed such a Grievance was Sam Thornal, a Heavy Equipment Operator employed by Utility Fuels, Inc. at Houston Lighting & Power's electric generating station in Limestone, Texas. Thornal, the most senior Heavy Equipment Operator at the Limestone facility employed

by Utility Fuels, had been laid off, based upon his "Marginal" rating received as a result of the Special Performance profiling process. The Grievance of Sam Thornal was ultimately presented to Arbitrator Otis H. King, pursuant to the parties' Grievance and Arbitration procedure, on June 17, 1993. This was the first case heard by an Arbitrator involving an employee laid off by Utility Fuels, Inc. At the Hearing, the Union raised two basic contentions: First, that the entire process utilized by the Company to select employees for layoff violated the Collective Bargaining Agreement, and requesting that the entire layoff be set aside, and secondly, even if the overall process utilized by the Company did not violate the Agreement, that the process as applied to the Grievant, Sam Thornal, did violate the Agreement. In essence, the second contention of the Union was an individual claim regarding the Grievant, Sam Thornal, and contending that the performance profile process as applied to the Grievant had produced an inaccurate result; in effect, the Union contended that Thornal was equal to or better than, in terms of "ability, skills and qualifications" other Heavy Equipment Operators with lesser seniority than Thornal who had not been laid off.

Arbitrator King considered all of the evidence and arguments of the parties, and issued a Decision and Arbitration Award on December 31, 1993. In his Award, Arbitrator King rejected the Union's first argument, and concluded that the process itself was not facially violative of the Contract. However, Arbitrator King sustained the Grievance with regard to the individual Grievant, Sam Thornal, finding that in fact the Grievant Thornal was at least equal to or better than, in terms of "ability, skills and qualifications", at least one Heavy Equipment Operator with less seniority than Thornal who had not been laid off. As a result of this conclusion, Arbitrator King ordered that Thornal be reinstated to his position, with full back pay.

On March 18, 1994 Houston Lighting & Power Company filed a lawsuit against the Petitioner Union in the United States District Court for the Southern District of Texas, seeking to set aside Arbitrator King's Award.[2]

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[2] By the time the lawsuit was filed, Sam Thornal's former employer, Utilities Fuels, Inc., no longer existed. It had been absorbed into Houston Lighting & Power in a corporate reorganization, and all employees of Utilities Fuel had been absorbed in and become employees of Houston Lighting & Power.

On August 25, 1994, United States District Judge Norman W. Black, Chief Judge of the Southern District of Texas, issued an Order granting Summary Judgment in favor of the Union, and denying the Summary Judgment Motion of the Company, and enforcing Arbitrator King's Award. Thereafter, on September 13, 1994, Houston Lighting & Power filed a Notice of Appeal with the United States Court of Appeals for the Fifth Circuit. Briefs were filed, and the case was presented for oral argument before a three-judge panel in New Orleans, Louisiana on May 4, 1995. Subsequently, on December 11, 1995, the Panel issued a Decision reversing the Decision of the District Court, and vacating that Decision, and the Arbitration Award. The Majority Opinion was written by Judge DeMoss, joined in by Judge Duhé, with Judge Lay, sitting by designation out of the Eighth Circuit Court of Appeals, dissenting.

The Petitioner Union filed a timely Petition for Rehearing on December 26, 1995. The Petition for Rehearing was denied by the Fifth Circuit on January 8, 1996. The Petitioner Union now asks this Court to grant this Petition for Writ of Certiorari, based upon the Union's well considered and good faith belief that the Fifth Circuit's Opinion directly conflicts with numerous

Opinions of other Circuit Courts, and with long-standing precedent of the United States Supreme Court regarding the role of the Court in reviewing and enforcing Arbitration Awards in the Collective Bargaining Agreement context. The Union believes that the Fifth Circuit Opinion, if allowed to stand, will likely have the effect of seriously undermining grievance and arbitration procedures contained in Collective Bargaining Agreements throughout the Fifth Circuit.

ARGUMENT

Any basic review of federal labor law, and of the many decisions of the Federal Courts, including this Court, on the issue, should lead one to the conclusion that there can be no question but that arbitration is the favored method of resolving labor disputes. Section 203(d) of the Labor Management Relations Act of 1947, as amended, states:

> "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." (29 U.S.C. §173(d)).

The foregoing provision, in and of itself, manifests a clear congressional intent to allow, and in fact encourage parties to collective bargaining agreements to resolve their disputes through an arbitral process.

Consistent with that congressional policy, this Court first held, in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), that Section 301 of the Labor Management Relations Act, 29 U.S.C. §185, vested jurisdiction in the federal district courts to enforce

agreements to arbitrate and arbitration awards. Moreover, the Court's Opinion in *Lincoln Mills* served as a mandate to all federal courts to fashion a body of substantive law that would effectuate this congressional policy. Three years later, in the famous "*Steelworkers Trilogy*",[3] the Court further refined the appropriate role of the courts in actions brought to enforce agreements to arbitrate and to enforce arbitration awards. The Court made direct reference to Section 203(d) and the policy expressed therein, and then stated:

> "That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *Steelworkers v. American Manufacturing Company*, *supra*, at 565.

American Manufacturing Company involved an action to enforce an agreement to arbitrate, but in a companion case, this Court discussed the role of the Court in actions

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[3] *Steelworkers v. American Manufacturing Company*, 363 U.S. 564, 565 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 595 (1960).

brought to enforce arbitration awards. The essence of the Court's statement was that the courts should stay away from the merits of the dispute, and undertake only a very limited role:

> "The refusal of the courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. As we stated in *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* ante. . . . decided this day, the arbitrators under these collective agreements are indispensable agencies in the continuous collective bargaining process. They sit to settle disputes at the plant level -- disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements." *Steelworkers of America v. Enterprise Wheel & Car Corp., supra.* at 595.

As indicated by the foregoing opinion of this Court, the role of the federal courts in an action seeking to vacate or set aside an arbitration award is, indeed, extremely limited, and any application seeking to have an arbitration award set aside should be granted only in the rarest of circumstances. Clearly, this Court premised its conclusion upon the favored position which arbitration enjoys in the labor relations context, and on the fact that:

> "Arbitration of labor disputes in collective bargaining agreements is part and parcel of the collective bargaining process itself." *Steelworkers of America a. Warrior & Gulf Navigation Co., supra.* at 578.

In the more than three and one-half decades that have passed since this Court first issued its Opinion in the "*Steelworkers Trilogy*", no decision has emanated from this Court that would in any way suggest that the principles enunciated by this Court in the *"Steelworkers Trilogy"* are not still the law of the land. To the contrary, any decision issued by this Court over the years, such as *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987), have consistently reaffirmed the teachings of the *Steelworkers Trilogy*. Moreover, countless opinions of

Federal Circuit Court over this same period of time have manifested full allegiance to this long-established law.

In this case, however, we have an Opinion that violates the most fundamental principle of the long-standing precedent of this Court. In issuing its decision vacating the underlying Arbitration Award, the Fifth Circuit Majority has done the one thing that this Court most vehemently warned against: The Fifth Circuit Majority has stepped into the role of the Arbitrator, and substituted its judgment for that of the Arbitrator.

While it is true that a cursory reading of the Fifth Circuit Opinion discloses some facial recognition of, and suggested adherence to, the long-standing precedent of this Court and of the Fifth Circuit, a true substantive analysis of the Fifth Circuit Majority Opinion discloses that in fact the Court failed to follow the teachings that it acknowledged to exist. No more apparent is this fact than in the following excerpt from the Fifth Circuit Majority Opinion:

> "Article IV, Section 7 of the Agreement bestows *upon the Company* the right to determine an employee's ability, skill and qualifications subject to an employee's right to assert a grievance. The phrase 'subject to

> an employee's right to assert a grievance' means that the employee may assert one or both of two contentions: (1) first he may assert that the system and procedures used by the Company in evaluating an employee's ability, skill and qualifications were inconsistent with the terms of the Agreement or were an improper application of the Agreement; and/or (2) secondly, he may assert that the Company discriminated against him because of race, color, religion, sex, or national origin in the evaluation process." (See *Houston Lighting & Power Company v. International Brotherhood of Electrical Workers Local Union No. 66* at Page 14). (Appendix 1)

By making the foregoing statement, which fundamentally determined the Majority's ultimate Opinion, the Court in effect substituted its interpretation of the Contract for that of the Arbitrator. It was the Arbitrator that was hired by the parties to resolve the dispute, and interpret the Contract. He did so. It was totally inappropriate for the Fifth Circuit, regardless of whether or not it believed the Arbitrator to be correct in his interpretation, to substitute

its interpretation of the Contract for that of the Arbitrator. See *United Paperworkers International Union v. Misco, Inc., supra.*

There are two fundamental problems with the Majority Opinion of the Fifth Circuit. First, its decision rests upon a gross misinterpretation of the contractual language. Secondly, and more importantly, it was fundamental error for the Fifth Circuit to, under the guise of determining the contractual authority of the Arbitrator, indulge in a fundamental interpretation of the Contract that in fact was an interpretation for the Arbitrator.

Article IV, Section 7 of the underlying Collective Bargaining Agreement provides, in pertinent part, as follows:

> "Section 7. Seniority . . . In the event of promotions, layoffs, or a permanent reduction in the working force at a facility, where ability, skill and qualifications are equal, length of service at that facility shall govern. . . . The Company shall determine ability, skill and qualifications subject to an employee's right to assert a grievance under Article II."

Article II, as referred to in the foregoing provision, provides, in pertinent part:

> "Article II, Section 1. A grievance, as that term is used in this contract, means any dispute involving the proper application or interpretation of this Agreement, or a claim that an employee has been unreasonably and unjustly discriminated against.
>
> Article II, Section 4. . . . The sole function of the arbitrators shall be to determine whether Company or Union is correct with reference to the proper application and interpretation of this Agreement and the arbitrators shall not have any authority to change, amend, modify, supplement or otherwise alter in any respect whatsoever this Agreement, or any part thereof."

This case emanates from an underlying grievance filed, as specifically authorized by Section 7 of the Agreement, and in accordance with Article II of the Agreement. The underlying grievance was specifically the grievance contemplated by Section 7 -- a grievance over the Company's "determination" of an employee's "ability, skill and qualifications" in the circumstances of a layoff, and for

the purposes of selecting employees for layoff. This was the grievance submitted to the Arbitrator, Otis King, for resolution, and it was this dispute which the Arbitrator resolved.

While it is true that the initial grievance filed by the Union contained both a broad claim attacking the entire procedure utilized by the Company for determining "ability, skill and qualifications", and the Arbitrator ruled in favor of the Company, and against the Union, on this issue, the grievance also contained the individual claim of the individual grievant, Sam Thornal, who had been laid off out of line of seniority solely as a result of the Company's determination of his "ability, skill and qualifications". The Arbitrator, given this dispute, and applying the clear language of the Contract that "where ability, skill and qualifications are equal, length of service at that facility shall govern", determined that this provision had been violated in the layoff of Sam Thornal, because there was at least one employee of lesser seniority than Thornal who had not been laid off, but with whom Thornal had at least equal "ability, skill and qualifications". All that the Arbitrator did was consider the employee's contest of the Company's determination of his "ability, skill and qualifications", and conclude that the employee

was right, and the Company wrong, with regard to the relative equality of his "ability, skill and qualifications" with comparable employees of lesser seniority who were not laid off. Thus, applying the Contract, the Arbitrator ordered the employee reinstated.

This was neither a complex nor unusual grievance. Yet, the Fifth Circuit took this grievance, and the Arbitration Award, and concluded that somehow the Arbitrator lacked the authority to resolve this dispute. In doing so, the Fifth Circuit grossly misinterpreted the contractual language.

The ultimate conclusion of the Fifth Circuit Majority Opinion is that, while acknowledging that the Contract clearly delineates "an employee's right to assert a grievance" contesting the Company's determination of his "ability, skill and qualifications", asserting that any such grievance could only be brought as "a claim that an employee has been unreasonably and unjustly discriminated against." This interpretation of the Contract by the Fifth Circuit Majority is a complete misreading of Article II, Section 1 of the Agreement, and effectively denied Sam Thornal, and potentially any other employee covered by this Agreement, the right to present a grievance over "the proper application or interpretation of

this Agreement". Clearly, Thornal and the Union had the right to "assert a grievance under Article II", and this necessarily means the entirety of Article II. In this regard, Article II clearly contemplates two types of grievances: First, "any dispute involving the proper application or interpretation of this Agreement", and secondly, "a claim that an employee has been unreasonably and unjustly discriminated against". Thornal's grievance was clearly one of the first type: It was a grievance over the proper application of the Agreement to Thornal, with regard to the Company's determination of his "ability, skill and qualifications". There was nothing whatsoever mysterious about the grievance, and it was clearly one contemplated by the Agreement. The Fifth Circuit Majority, however, completely denied Thornal and the Union's right to bring this Grievance, as a result of a totally unexplained misinterpretation of the grievance provision of the Contract.

As a result, we have a result here that is premised upon a clear mistake in contractual interpretation on the part of the Fifth Circuit Majority. That much, alone, is a reasonable basis to reverse that decision. However, the more glaring problem with the Fifth Circuit Majority Opinion is that it indulged in such an analysis in the first

instance. The Fifth Circuit Majority Opinion wrongly limits, if not totally destroys, the grievance right of employees covered by this Collective Bargaining Agreement; the Fifth Circuit's clear violation of long-standing precedent of this Court, however, lies in the fact that it indulged in a comparative analysis between multiple contractual provisions, and thereby ultimately replaced its interpretation of the Contract, and thus its judgment regarding the merits of the underlying dispute, for that of the Arbitrator. This action of the Fifth Circuit Majority Opinion is clearly not allowed by the decisions of this Court, and conflicts with decisions of all Circuit Courts, including the Fifth Circuit.

The fundamental question before the Fifth Circuit was merely whether or not the Award of Arbitrator King "drew its essence" from the Collective Bargaining Agreement. See *Delta Queen Steamboat Co. v. District 2 Marine Eng'rs Beneficial Ass'n,* 889 F.2d 599, 602 (5th Cir. 1989), *cert. denied,* 498 U.S. 853, 111 S.Ct. 148, 112 L.Ed.2d 114 (1990). In order to accomplish this task, all that the Circuit needed to do was to look at the grievance and arbitration provision of the Contract, and in particular, Article II, Section 4 thereof, which is the only provision that places limitations upon, or otherwise

defines, the role of the Arbitrator under this Collective Bargaining Agreement. Had the Fifth Circuit limited itself to such an examination, it would have seen that the only limitation upon the authority of the Arbitrator within the Contract was that he or she did "not have any authority to change, amend, modify, supplement or otherwise alter in any respect whatsoever this Agreement, or any part thereof." Manifestly, Arbitrator King did none of these things. He merely resolved a dispute over the Company's determination of an employee's "ability, skill and qualifications", as specifically authorized by Section 7 of the Contract.

Moreover, had the Circuit limited its examination of the Contract, to only that as necessary to resolve the sole question of whether the Arbitrator's Award "drew its essence" from the Collective Bargaining Agreement, it would have seen that the Contract, in typical fashion, stated simply that "the sole function of the Arbitrator shall be to determine whether Company or Union is correct with reference to the proper application and interpretation of this Agreement. . ." Again, this is precisely what the Arbitrator did: He took and resolved the disputes placed before him, which were disputes over the "proper application and interpretation of this Agreement", and he

determined that in one instance, the Company was correct, and in the other, the Union was correct.

Unquestionably, had the Fifth Circuit Majority limited its examination, as long standing precedent of this Court clearly directs it to do, to an examination of any limitation upon, and any definition of, the authority of the Arbitrator under the Agreement, the Circuit Court would have seen that Arbitrator King acted fully within his authority, and within the limitations on his authority, and seeing this, the Fifth Circuit examination of the issue should have ended there. Unfortunately, it did not; rather, the Circuit went beyond the limited examination that the precedent of this Court allows, and indulged in extensive contractual analysis, including comparative analysis of multiple contractual provisions, and ultimately reached conclusions that lead it to vacate the Arbitration Award.

The contractual analysis engaged in by the Fifth Circuit was clearly wrong; the analysis was faulty and produced a complete misinterpretation of the Collective Bargaining Agreement. However, such is not where the real error of the Circuit exists in this case; its error was not in its faulty and poorly reasoned contractual analysis;

its error was in indulging in the analysis in the first instance.

Acting under the guise of determining the question of whether or not Arbitrator King's Award "drew its essence" from the Collective Bargaining Agreement, the Fifth Circuit Majority undertook the job of the Arbitrator; the Fifth Circuit interpreted contractual provisions which were presented to the Arbitrator for resolution, and should not have been reinterpreted by the Court of Appeals. In the final analysis, the result was a complete usurpation on the part of the Fifth Circuit Court of the authority of the Arbitrator, and an ultimate substitution by the Circuit Court of its judgment with regard to the merits of the dispute for that of the Arbitrator.

There can be no question but that this action of the Fifth Circuit is error, and clearly at odds with long-standing precedent of this Court. Moreover, the analysis of the Fifth Circuit, and the manner in which it went about its reasoning leading to its ultimate decision, not only has had the effect of totally emasculating the grievance procedure of the Petitioner Union, but it also, if allowed to stand, has the potential effect of doing the same to grievance procedures contained in Collective Bargaining Agreements throughout the Fifth Circuit. This

Opinion of the Fifth Circuit is not only wrong, and totally contrary to long-standing precedent of this Court, but it has the very dangerous and real potential of producing more and continual decisions which will effectively undermine the fundamental concept of arbitration as being the favored method of resolving labor disputes. For that reason, this case merits the consideration of this Court, and ultimately the action of this Court in reversing the decision of the Fifth Circuit.

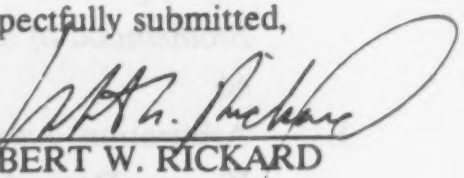
CONCLUSION

Sam Thornal was laid off from his job as a result of his employer's determination of his "ability, skill and qualifications". The Collective Bargaining Agreement that covered his employment with his employer authorized him to grieve this determination of his "ability, skill and qualifications". He and his Union did that, and this grievance was ultimately presented to an Arbitrator for resolution. That Arbitrator resolved the dispute, by concluding that the Company was not correct in its determination of Thornal's "ability, skill and qualifications", and that in fact, his "ability, skill and qualifications" were "equal" with at least one employee of lessor seniority who was not laid off. As a result, the Arbitrator applied the contractual seniority clause, and directed the Company to reinstate the Grievant.

Subsequently, a lawsuit was filed, and the dispute came before a Judge of the United States District Court for the Southern District of Texas. Judge Norman Black, analyzing the case consistent with long-standing precedent of the United States Supreme Court, concluded that the Arbitrator's Award "drew its essence" from the Collective Bargaining Agreement. The case then came before the United States Court of Appeals for the Fifth Circuit,

which had it limited its examination in accordance with Supreme Court precedent, would have reached the same conclusion. However, the Fifth Circuit assumed the role of the Arbitrator, and indulged in extensive analysis and interpretation of the contractual language, and the underlying dispute, and ultimately substituted its judgment for that of the Arbitrator. That decision, being totally at odds with the teachings of this Court, cannot be allowed to stand.

Respectfully submitted,



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LIST OF APPENDIX

1. Decision of the United States Court of Appeals for the Fifth Circuit in No. 94-20693; *The Houston Lighting & Power Company vs. The International Brotherhood of Electrical Workers, Local Union No. 66*, entered on December 11, 1995.
2. Final Order issued by Judge Norman W. Black on August 25, 1995, in the United States District Court for the Southern District of Texas, Houston Division in Civil Action No. H-94-908; *Houston Lighting & Power Company vs. The International Brotherhood of Electrical Workers, Local Union No. 66*
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4. Order denying Petition for Hearing issued on January 8, 1996 in No. 94-20693; *Houston Lighting & Power Company vs. The International Brotherhood of Electrical Workers, Local Union No. 66*, In the United States Court of Appeals for the Fifth Circuit.
5. Section 301 of the Labor Management Relations Act, 29 U.S.C. §185.
6. Section 203(d) of the Labor Management Relations Act, 29. U.S.C. §173(d)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20693

THE HOUSTON LIGHTING & POWER COMPANY,
f/k/a Utility Fuels, Inc.
a/k/a Houston Industries, Inc.,

Plaintiff-Appellant,

VERSUS

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 66,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

December 11, 1995.

Before LAY[1], DUHÉ and DeMOSS, Circuit Judges.

DeMOSS, Circuit Judge:

In an action to set aside an arbitration award, we face the recurring question of whether an arbitrator

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[1]Senior Judge of the United States Court of Appeals for the Eight Circuit, sitting by designation.

exceeded his authority by failing to draw the essence of his decision from the terms of the parties' collective bargaining agreement. The district court found that the arbitrator did not exceed his authority and summary judgment was entered in favor of Defendant. For the following reasons, we reverse and vacate.

BACKGROUND

In 1992, Houston Lighting and Power Company ("HL&P") conducted a reduction in force ("RIF") which resulted in the discharge of approximately 1,100 workers.[2] Among those discharged was Sam Thornal, a heavy equipment operator at HL&P's Limestone, Texas facility, and a member of the International Brotherhood of Electrical Workers, Local Union No. 66 ("the Union"). The Union filed a grievance on Thornal's behalf claiming that HL&P has violated the seniority provision of the collective bargaining agreement ("Agreement") because HL&P retained employees who had less seniority than Thornal.

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[2] Houston Lighting and Power Company is a wholly owned subsidiary of Houston Industries, Inc., and the successor in interest to Utility Fuels, Inc.

Pursuant to the terms of the collective bargaining agreement, the Union's grievance was submitted to arbitration. At arbitration, the Union challenged the facial validity of HL&P's evaluation process claiming that it violates the collective bargaining agreement because it is arbitrary, unjust, and unreasonable.[3] The Union also argued that, even if the evaluation procedure is deemed legitimate, it was applied to Thornal in an unfair and unreasonable manner. The arbitrator found that the Agreement "allowed the Company to develop some system

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[3]HL&P evaluated employees though [sic] a merit-based system, ranking them on ability, skill and qualifications. The rankings were made by supervisors in the employees' respective job classifications. Depending upon their evaluations, employees were placed in one of three groups: "above average," "average," or "marginal." Employees were ranked only against other employees within the same job classification. In each particular job classification, the lowest-ranking employees were discharged in reverse order until the required RIF terminations were achieved. Seniority was only an issue when the company determined that two employees were of "equal" skill. Absent such a determination, the merit rankings controlled the RIF. The company eliminated two of eight heavy equipment operator positions at its Limestone, Texas facility. Thornal and another employee, "Byers," were the only two heavy equipment operators rated "marginal." They were each terminated.

of evaluating its employees" and that "the procedures utilized by the Company were on their face, reasonably calculated to fairly accomplish the determination of 'ability, skill and qualifications' consistent with the requirements of the [Agreement]." Furthermore, the arbitrator found that the criteria utilized in the evaluation process were "within the scope of the contractually allowable factors of an employees 'ability, skill and qualifications'." Accordingly, the arbitrator held that the Union failed to show that the evaluation process was facially invalid. However, the arbitrator did find that HL&P's application of the evaluation process to Thornal was unreasonable. The arbitrator held that HL&P was not justified in laying-off Thornal because, in the arbitrator's opinion, Thornal deserved a higher evaluation. The arbitrator arrived at this conclusion by reviewing various employee performance ratings and re-assessing the abilities, skills, and qualifications of Thornal as compared to those of other employees. Based upon his own review and reassessment of Thornal's qualifications, the arbitrator drew from his collective bargaining experience "in the federal public sector" and concluded that Thornal had been wrongly appraised. The arbitrator determined that Thornal was entitled to a higher rating and that, with such

a rating, under the terms of the Agreement, he should not have been laid-off. The arbitrator ordered HL&P to reinstate Thornal with backpay and seniority, along with the benefits that he would have received had he not been laid-off.

Houston Lighting & Power appealed the arbitrator's finding in federal district court. On August 25, 1994, the district court granted Defendant's cross-motion for summary judgment and denied Plaintiff's motion for summary judgment. The district court upheld the arbitrator's findings and entered judgment in favor of the Union. Houston Lighting & Power timely filed a notice of appeal.

DISCUSSION

The sole issue before this Court is whether the arbitrator exceeded his authority under the collective bargaining agreement when he re-evaluated Thornal's qualifications and re-calculated his performance rating. For the following reasons, we conclude that he did.

Standard of Review

Where a party appeals a grant of summary judgment in a suit to vacate an arbitration award, we review the district court's ruling under a *de novo* standard. HMC Management Corp. v. Carpenters Dist. Council, 750

F.2d 1302, 1304 (5th Cir. 1985). The law regarding judicial review of labor disputes is well settled. "So long as the arbitrator's decision draws its essence from the collective bargaining agreement and the arbitrator is not fashioning his own brand of industrial justice, the award cannot be set aside." Delta Queen Steamboat Co. v. District 2 Marine Eng'rs Beneficial Ass'n, 889 F.2d 599, 602 (5th Cir. 1989) (quotations omitted), cert. denied, 111 S.Ct. 148 (1990). Notwithstanding this deferential standard of review, federal courts are free to scrutinize an award to ensure that the arbitrator acted in conformity with the jurisdictional prerequisites of the collective bargaining agreement. Id. See also United Paperworkers Int'l Union v. Misco, Inc., 108 S. Ct. 364 (1987) (holding that judicial deference ends where an arbitrator exceeds the express limitations of the contractual mandate). When an arbitrator exceeds his authority, vacation of the judgment is appropriate. See United States Postal Serv. v. American Postal Workers Union, 922 F.2d 256, 258 (5th Cir. 1991) (holding that an arbitrator's decision on the merits will not be enforced if the arbitrator exceeded his authority under a collective bargaining agreement).

The Agreement

The relevant portions of the collective bargaining agreement are as follows:

> **Purpose.** There shall be no discrimination against any employee by the Company, Union, or any other employee because of race, color, religion, sex or national origin.
>
> *****
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> **Article II, Section 1.** A grievance, as that term is used in this contract, means any dispute involving the proper application or interpretation of this Agreement, or a claim that an employee has been unreasonably and unjustly discriminated against.
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> *****
>
> **Article II, Section 4.** The sole function of the arbitrators shall be to determine whether Company or Union is correct with reference to the proper application and interpretation of this Agreement and the arbitrators shall not have any authority to change, amend, modify, supplement or otherwise alter in any respect whatsoever this Agreement, or any part thereof.
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> *****

Article III, Section 5. The Company shall have the exclusive right to determine its operating policies and manage its business in the light of experience, business judgment and changing conditions consistent with the terms and conditions of this Agreement. The Company shall retain all right, power and authority not specifically relinquished in this Agreement.

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Article IV, Section 7. Seniority. ...In the event of ... layoffs, or a permanent reduction in the working force at the facility, where ability, skill and qualifications are equal, length of service at that facility shall govern. ...The Company shall determine ability, skill and qualifications, subject to an employee's right to assert a grievance Article II.

Analysis

The only issue before us is whether the arbitrator exceeded his authority under the Agreement when he re-evaluated Thornal's qualifications and re-calculated his performance rating. The "rule in this circuit, and the emerging trend among the other courts of appeals, is that

arbitral action contrary to express contractual provisions will not be respected." Delta Queen Steamboat Co., 889 F.2d at 604. If an arbitrator exceeds his authority, vacation of the judgment is appropriate. Container Products, Inc. v. United Steelworkers of America, and its Local 5651, 873 F.2d 818, 820 (5th Cir. 1989).

In disagreeing with the supervisor's evaluation of Thornal, the arbitrator stated, in relevant part:

> The Arbitrator routinely hears annual appraisal grievances in the federal public sector. In those cases, if the Arbitrator finds that the grievant has not been accurately and fairly appraised in accordance with law, rule, regulation, or the parties [sic] Master Labor Agreement, he is to set aside the rating. Once having decided to set aside the rating, the Arbitrator must then decide whether he is able to determine from the record before him what the performance appraisal would have been but for management's violation. If he can make such a determination, he may order the appraisal rating that he believes is appropriate. ...In this case, the

> Arbitrator finds that the Company did not give the Grievant a fair appraisal. Moreover, the Arbitrator is able to determine from the record, at least what the minimum performance rating should have been. The Grievant should have received no less than "2" on "Job-Related Characteristics." ...On the element of "Other job-related factors" the Grievant should have been assigned, at minimum, a +2. ...On the other hand, the Grievant should have received the same credit for low absenteeism as was assigned Trammel. Additionally, the Grievant should have been awarded credit for having trained others as was given to Dillard. These are the minimum score changes that the Arbitrator would make based on the record before him.

Based upon his re-assessment of Thornal's qualifications, the arbitrator upwardly adjusted Thornal's score and concluded that, in light of the higher score, HL&P was not justified in laying him off. The arbitrator sustained the

grievance and reinstated Thornal with backpay and certain benefits.

In affirming the arbitrator's finding, the district court held:

> The submitted issue in the arbitration was whether or not the Company had violated the collective bargaining agreement by laying off Thornal out of line of seniority. The arbitrator found that the Company had violated the agreement and ordered Thornal's reinstatement. Indeed, Plaintiff states in its [summary judgment] brief "The arbitrator's sole function is to determine whether the Union or UFI [now HL&P] was correct in deciding that Thornal was less qualified than the junior employees whom UFI retained over him." This is exactly what the arbitrator did.[4]

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[4]After a complete review of the record, we find that the statement made by HL&P's counsel in the "Summary of Arguments" section of its brief may be a misstatement or, as HL&P urges, taken out of context from the rest of the argument. It simply does not accurately reflect or summarize the contentions made by HL&P in the body of its summary

Summary judgment was granted in favor of the Union.

Since arbitration is primarily a matter of contract, an arbitrator's award must "draw its essence from the collective bargaining agreement." United Steel Workers v. Enterprise Wheel & Car Corp., 80 S.Ct. 1358, 1361 (1960); United Paperworkers Int'l Union v. Misco, Inc., 108 S.Ct. 364, 370 (1987). In applying the "essence" test, we have declared that an arbitrator's award "must have a basis that is at least rationally inferable, if not obviously drawn, from the letter or purpose of the collective bargaining agreement." Executone Info. Systems, Inc. v. Davis, 26 F.3d 1314, 1325 (5th Cir. 1994) (citations omitted). The arbitrator has no license to "fashion his own brand of industrial justice." Delta Queen Steamboat Co., 889 F.2d at 602. "When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." Enterprise Wheel., 80 S. Ct. at 1361.

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judgment brief. In our view, the best evidence of what the parties agreed to is found in the Agreement, itself, and not in the summary section of HL&P's brief. In the interest of justice, we are reluctant to rely upon what appears to be an obvious misstatement by counsel to support a decision which is adverse to that counsel's client.

After reviewing both the collective bargaining agreement and the findings of the arbitrator, we conclude that the portion of the arbitrator's award in which the arbitrator re-evaluated Thornal's qualifications did not draw its essence from the Agreement. Article II of the Agreement states that "the sole function of the arbitrators shall be to determine whether [the] Company or Union is correct with reference to the proper application and interpretation of this Agreement." "[A]ny dispute involving the proper application or interpretation of this Agreement, or a claim that an employee has been unreasonably and unjustly discriminated against," is defined by the Agreement as a "grievance."

The thrust of the Union's argument is that, while Article IV, Section 7 of the Agreement permits HL&P to determine an employee's ability, skill and qualification, this determination is subject to the grievance procedure under Article II. The Union argues that the grievance procedure gives an arbitrator the authority to re-evaluate the employee's qualifications and then re-calculate that employee's performance rating. The Union argues that these findings by the arbitrator are binding upon HL&P. We disagree.

Article IV, Section 7 of the Agreement bestows *upon the Company* the right to determine an employe's ability, skill, and qualifications, subject to an employee's right to assert a grievance. The phrase "subject to an employee's right to assert a grievance" means that the employee may assert one or both of two contentions: (1) first he may assert that the system and procedures used by the Company in evaluating an employee's ability, skill and qualifications were inconsistent with the terms of the Agreement or were an improper application of the Agreement; and/or (2) secondly, he may assert that the Company discriminated against him because of race, color, religion, sex, or national origin in the evaluation process.

We note that the Union has not raised a claim of discrimination. Nor has the arbitrator addressed discrimination in his findings. Accordingly, the nature of the grievance brought by the Union pertains only to the Union's dispute involving the proper application or interpretation of the Agreement. Also, as stated earlier, the arbitrator found that the evaluation process was "reasonably calculated to fairly accomplish the determination of utility, skill and qualifications" and that the criteria used in the process were "within the scope of contractually allowed factors;" he found that Thornal had

failed to show that the evaluation process was facially invalid. The phrase "subject to an employee's right to assert a grievance" does not mean that the Company loses its right to make the qualification determination once an employee asserts a grievance. That phrase does not confer upon the arbitrator the right to make a de novo determination of the employee's qualifications. It is important to note that nothing in the Article II, Section 1 definition of "a grievance" can be rationally interpreted to include the concept that a grievance includes a claim that an employee has been unfairly or incorrectly evaluated for lay off. Furthermore, the arbitrator's reliance upon his experience and practice in other arbitrations in the "federal public sector" is clearly outside the language of the Agreement. The right to make the ultimate determination remains with the Company.

If the language of the agreement is clear and unequivocal, an arbitrator is not free to change its meaning. See Delta Queen, 889 F.2d at 602. The Company has the exclusive right to make the employee qualification determinations. Nowhere in the Agreement does it state that re-determination shall be made by the arbitrator. If the arbitrator had found that the evaluation process was not consistent with the Agreement, then the

Arbitrator should remand the matter to the Company so that *the Company* can make the re-determination of the employee's qualifications under another valid process.

By performing his own re-evaluation, the arbitrator went beyond the scope of his authority, and beyond the parties' contractual agreement. Accordingly, the judgment of the district court is reversed and the arbitration award is vacated.

LAY, Circuit Judgment, dissenting.

I respectfully dissent.

There should be little dispute federal district courts possess limited resources to deal with the tremendous volume of cases filed before them. Our entire judicial system faces constant pressure to expedite our decisional process. Every district judge is challenged through self-education, seminars, and bench books to acquire skills to shorten trials and make expedited decisions. Certainly, one of the more practical shortcuts in pending litigation is for counsel to define the issues the court must decide. The pretrial discovery process is designed to do just that. As clients must rely on the professionalism of their selected lawyers as agents, judges must rely upon counsel to define the issues the courts must decide. After all, the lawyers are the ones who have prepared the cases, filed briefs on both factual and legal issues, and are much more knowledgeable of what the case submitted is about.

In the present case, the experienced trial judge followed that procedure in making inquiry of the lawyers: What are the issues before me? The parties submitted their respective briefs and defined the scope of the arbitrator's authority. Relying on HL&P's brief, the trial judge found that the arbitrator did nothing more than

what HL&P stated the arbitrator had a right to do. In ruling for the Union, the district judge wrote:

> The submitted issue in the arbitration was whether or not the Company had violated the collective bargaining agreement by laying off Thornal out of line of seniority. The arbitrator found that the Company had violated the agreement and ordered Thornal's reinstatement. Indeed, Plaintiff states in its brief "The arbitrator's sole function is to determine whether the Union or UFI [now HL&P] was correct in deciding that Thornal was less qualified than the junior employees whom UFI retained over him." This is exactly what the arbitrator did.

Houston Lighting & Power Co v. The Int'l Bhd. of Elec. Workers, Local No. 66, No. H-94-908, at 2 (S.D. Tex. Aug. 25, 1994).

The majority now rejects the district court's reliance on HL&P's brief by saying "[i]n the interest of justice, we are reluctant to rely upon what appears to be an obvious misstatement by counsel to support a decision which is adverse to that counsel's client." Ante at 6, n.4. This

overlooks, however, the fact that HL&P previously defined the issue to the arbitrator in similar terms: "[d]id the Company unreasonably and unjustly discriminate against Grievant by terminating him while retaining less senior heavy equipment operators?" (R. at 16.) The district court reasonably relied upon HL&P's counsel's definition of the issues and I find such reliance reasonable. I would affirm the district court based upon HL&P's refinement of the issue. To do otherwise, I respectfully submit, undermines the authority of the district court and creates uncertainty as to whether district courts may rely upon counsel's statement of issues in order to shorten proceedings.[1]

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[1]In a habeas corpus cases, Coleman v. Thompson, 501 U.S. 722 (1991), the Court observed that "[a]ttorney ignorance or inadvertence is not "cause" because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error.'" Id. at 753 (citing Murray v. Carrier, 477 U.S. 478, 488 (1986)). In Coleman, the Court cites Link v. Wabash R.R., 370 U.S. 626, 634 (1962) and Irwin v. Department of Veteran's Affairs, 498 U.S. 89, 92 (1990), stating that in "our system of representative litigation . . . each party is deemed bound by the acts of his lawyer-agent." Id. at 753.

I respectfully submit the majority also errs in faulting counsel. HL&P's brief defined the scope of the arbitrator's authority to the district court in the manner that it did because the terms of the collective bargaining agreement required it to do so. HL&P's exclusive right to determine its operating policies must be read in conjunction with Article IV, Section 7, which provides in the event of layoffs, "where ability, skill and qualifications are equal, length of service at that facility shall govern . . . The Company shall determine ability, skill and qualifications, subject to an employee's right to assert a grievance under Article II." (R. at 24.) (emphasis added). Article II, Section 1, defines a grievance as "any dispute involving the proper application or interpretation of this Agreement, or a claim that an employee has been unreasonably and unjustly discriminated against." (R. at 28.) (emphasis added). Finally, Article II, Section 4, provides that "[t]he sole function of the arbitrator[] shall be to determine whether the Company or Union is correct with reference to the proper application and interpretation of this Agreement." (R. at 27.) (emphasis added). Thus, the arbitrator was expressly authorized by the terms of the agreement, and by the submission of the parties, to determine whether HL&P was correct in deciding that

Thornal was less qualified than the junior employees whom HL&P retained over him.

The arbitrator found HL&P's evaluation process was facially valid, but he then focused specifically on its application to Thornal. Although previously accepting HL&P's evaluation scheme of "relative ability" as being legitimate, he found that the "decision to terminate the Grievant while retaining Trammel [the other employee with less seniority] . . . was [not a] reasonable one." (R. at 4.) In disagreeing with the supervisor's evaluation of Thornal, the arbitrator found that HL&P did not give him a fair appraisal. Based upon the record before him, the arbitrator found that Thornal should have received the same credit for low absenteeism as was assigned another employee, Trammel. He also found that Trammel should have been awarded credit for having trained others as was given to another employee, Dillard.[2] Thus, the arbitrator

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[2]The arbitrator made a detailed objective analysis of HL&P's evaluation of other less senior employees in contrast to Thornal's rating. For example, two employees, Payne and Trammel, received +2 points for lack of absenteeism whereas Trammel had an excellent attendance record and received zero points. Based upon this exacting analysis, it is little wonder the arbitrator found that as to Thornal the supervisor arbitrarily discriminated against him by "deliberately and

found that HL&P failed to fairly apply the terms of the collective bargaining agreement in that Thornal was equal in ability, skills and qualifications and yet another employee with less seniority was retained.

Although HL&P urges that it had the exclusive right to determine Thornal's ability, skill and qualification, it is also true that the plain terms of Article IV, Section 7 subjects that determination to the grievance procedure within the collective bargaining agreement. It is clear from the terms of the agreement to which HL&P agreed that HL&P's determination was subject to review through the grievance machinery. The grievance provision of Article IV, Section 7 simply cannot be ignored.

The arbitrator's explicit language recognizes the precise authorization he was following in deciding the grievance proceeding. In granting the award he wrote "[h]aving found that the Company acted unreasonably and unjustly in the manner that it applied its layoff evaluation process to the Grievant, it was not justified in laying off the Grievant out of line of seniority while retaining

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unreasonably" depriving him of the necessary points to reach an "average" rating. (R. at 5.)

employees with less seniority. Accordingly, the grievance is sustained." (R. at 2.) (emphasis added).

In United Paperworkers Int'l Union v. Misco., Inc., 484 U.S. 29, 38 (1987), the Court observed, "[A]s long as the arbitrator is . . . acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." While a court may review whether an arbitrator has exceeded his scope of authority, it must resolve all doubts in favor of the arbitrator's authority. See United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960). HL&P's challenge to the arbitrator's methodology of analysis slights this court's opinion in Anderman/Smith Operating Co. v. Tennessee Gas Pipeline Co., 918 F.2d 1215 (5th Cir. 1990). There Judge Johnson observed:

> [T]his Court does not review the language used by, or the reasoning of, the arbitrators in determining whether their award draws it essence form the contract. This Court looks only to the result reached. The single question is whether the award, however arrived at, is rationally inferable from the contract. See Local Union 59, Int'l Bhd. of

> Elec. Workers v. Green Corp., 725 F.2d 264, 268 (5th Cir.), cert. denied, 469 U.S. 833, 105 S. Ct. 124, 83 L.Ed.2d 66 (1984). Indeed, arbitrators are generally not even required to disclose or explain the reasons that underlie their decision. See, e.g., [Antwine v. Prudential Bache Sec., Inc., 899 F.2d 410, 412 (5th Cir. 1990)].

Id. at 1219 n.3.

The majority observes "[t]he Company has the exclusive right to make the employee qualification determinations. Nowhere in the Agreement does it state that re-determination shall be made by the arbitrator. If the arbitrator had found that the evaluation process was not consistent with the Agreement, then the Arbitrator should remand the matter to the Company so that the *Company* can make the re-determination of the employee's qualifications under another valid process." Ante at 9. Thus, the majority appears to support HL&P's additional claim that the arbitrator did not have the authority to provide the remedy of reinstatement and the award of back pay. It is well settled that "courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on

error of fact or on misinterpretation of the contract." See Misco, 484 U.S. at 36 (citing United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960)).

It is established law "that though the arbitrator's decision must draw its essence from the agreement, he 'is to bring his informed judgment to bear in order to reach a fair solution of a problem. *This is especially true when it comes to formulating remedies.*'" Id, at 41 (emphasis in original, quoting Enterprise Wheel, 363 U.S. at 597).[3]

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[3]The Company protests the arbitrator's reference to his knowledge of "grievances in the federal public sector" where once a job rating is set aside, the arbitrator then orders the appraisal rating that he deems appropriate. Thus, the Company urges that the arbitrator is going outside the collective bargaining agreement to make its findings. This colloquy by the arbitrator, in my judgment, simply explains the remedy by which the arbitrator orders the Grievant reinstated. The remedy lies exclusively within the arbitrator's judgment and his analogy to the remedy he has invoked in federal sector cases does not violate his authority. As the Supreme Court explained in Warrior & Gulf

> The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law -- the practices of industry and the shop -- is equally a part of the collective bargaining agreement although not expressed in it. The labor

As the Court reminded us in Enterprise Wheel:

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency.[4]

> arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment.

363 U.S. at 581-82.

[4]Equally relevant is the Supreme Court's additional observation:

> The collective bargaining agreement could have provided that if any of the employees were wrongfully discharged, the remedy would be reinstatement and back pay up to the date they were returned to work.

363 U.S. at 597.

On the basis of the above analysis, I would think it clear that the arbitrator's opinion drew his decision from

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> Respondent's major argument seems to be that by applying correct principles of law to the interpretation of the collective bargaining agreement it can be determined that the agreement did not so provide, and that therefore the arbitrator's decision was not based upon the contract. The acceptance of this view would require courts, even under the standard arbitration clause, to review the merits of every construction of the contract. This plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final. This underlines the fundamental error which we have alluded to in United Steelworkers of America, v. American Manufacturing Co., [363 U.S. 564 (1960)], decided this day. As we there emphasized, the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

the essence of the collective bargaining agreement. I would affirm the judgment of the district court.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HOUSTON LIGHTING & POWER COMPANY, Plaintiff	§	
	§	C.A. No.
VS.	§	H-94-908
THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NO. 66, Defendant.	§	

FINAL ORDER

In accordance with the Court's order issued this day, it is hereby

ORDERED that Plaintiff's Motion for Summary Judgment (Entry #5) is **DENIED** and Defendant's Motion for Summary Judgment (Entry #9) is **GRANTED.**

THIS IS A FINAL ORDER.

SIGNED this 25th day of August, 1994 at Houston, Texas.

SIGNED: s/NORMAN W. BLACK

CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HOUSTON LIGHTING & POWER COMPANY, Plaintiff	§	
	§	C.A. No.
VS.	§	H-94-908
THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NO. 66, Defendant.	§	

ORDER

This action to set aside an arbitration award was filed by Houston Lighting & Power Company ("HL&P") and is currently before the Court on cross-motions for summary judgment. The facts are undisputed. During a 1992 reduction-in-force at HL&P and its sister company Utility Fuels, Inc., Sam Thornal was laid off and more junior employees were retained. The Union brought a grievance on behalf of Thornal, and the matter proceeded to arbitration. The arbitrator sustained the grievance, finding that Thornal possessed skills and abilities equal to or superior to those of the more junior employees retained.

The role of the federal court in actions regarding arbitration awards is extremely limited. The merits of the award are not before the Court, and the award must be enforced if it draws its essence from the collective bargaining agreement. Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). Recognizing the limited scope of the federal court's review, Plaintiff alleges that the arbitrator's award did not draw its essence from the collective bargaining agreement and that it exceeded the arbitrator's authority. The Court finds these allegations to be without merit.

The submitted issue in the arbitration was whether or not the Company had violated the collective bargaining agreement by laying off Thornal out of line of seniority. The arbitrator found that the company had violated the agreement and ordered Thornal's reinstatement. Indeed, Plaintiff states in its brief "The arbitrator's sole function is to determine whether the Union or UFI [now HL&P] was correct in deciding that Thornal was less qualified than the junior employees whom UFI retained over him." This is exactly what the arbitrator did. The arbitrator determined that the Company failed to carry its burden of proof that Thornal should have received a lower rating than the employee who scored 2 points higher. Therefore,

according to the arbitrator, Thornal and the more junior employee were relatively equal and Thornal, the more senior, should have been retained. This decision clearly draws its essence from the collective bargaining agreement and is in complete compliance with the authority given the arbitrator.

Plaintiff argues that the discussion by the arbitrator regarding his prior experience in the federal public sector establishes that sources outside the collective bargaining agreement were the basis for the decision. The dicta relied upon by Plaintiff, however, follows a thorough analysis of the collective bargaining agreement at issue and of the relative evaluations of Thornal and the junior employee and does not provide the basis for the arbitration award.

Based upon the foregoing, the Court finds no basis to set aside the arbitration award. As a result, Plaintiff's motion for summary judgment should be denied and Defendant's motion should be granted. An appropriate final order consistent herewith shall be issued this day.

SIGNED this 25th day of August, 1994, at Houston, Texas.

SIGNED: s/NORMAN W. BLACK
CHIEF JUDGE

UTILITY FUELS, INC.

AND

INTERNATIONAL BROTHERHOOD OF

ELECTRICAL WORKERS,

LOCAL 66, AFL-CIO

A 70 300 0033 93

LAYOFF OF SAM L. THORNAL

APPEARANCES

FOR THE COMPANY

L. CHAPMAN SMITH

ROSS E. COCKBURN

FOR THE UNION

ROBERT W. RICKARD

BEFORE

OTIS H. KING, ARBITRATOR

Utility Fuels, Inc. hereinafter called "UFI" or "Company" and International Brotherhood of Electrical Workers, Local Union No. 66, AFL-CIO, hereinafter called "Union" did appear before the undersigned duly appointed and authorized Arbitrator and present the following issues:

Union's version of the issue

Whether or not the Company violated the Collective Bargaining Agreement, and specifically, Article IV, Section 7 thereof, in the manner in which it conducted the reduction in force in the Spring [sic] of 1992, and whether or not the Company violated the Collective Bargaining Agreement in laying off Sam Thornal out of line or seniority? If any violation of the Collective Bargaining [Agreement] is found, then what is the appropriate remedy?

Company's version of the issue

Did the Company unreasonably and unjustly discriminate against Grievant by terminating him while retaining less senior heavy equipment operators?

A hearing was held on June 17, 1993, at the University Hotel, Sam Houston State University, in Huntsville, Texas. Both parties appeared at the hearing and were afforded a full opportunity to be heard, examine and cross-examine witnesses, and to introduce evidence bearing upon the issue. A transcript was prepared of the proceedings and both parties have submitted written post hearing briefs.

RELEVANT CONTRACT PROVISIONS

ARTICLE III, SECTION 5

> The Company shall have the exclusive right to determine its operating policies and manage its business in the light of experience, business judgment and changing conditions *consistent with the terms and conditions of this Agreement* (emphasis added). The Company shall retain all right, power and authority not specifically relinquished in this Agreement.

ARTICLE IV, SECTION 7

> In the event of promotions, layoffs, or a permanent reduction in the working force at a facility, where ability, skill and

qualifications are equal, length of service at that facility shall govern. . . the Company shall determine ability, skill and qualifications subject to an employee's right to assert a grievance under Article II. . .

FINDINGS OF FACT

Utility Fuels[1] (UFI), at the time of the occurrence of the events that gave rise to this case, was owned by Houston Industries Incorporated which is also the parent company of Houston Lighting and Power (HL&P). UFI maintained employees at two HL&P power plants, one commonly known as W. A. Parish Plant, located west of Houston and the other commonly known as the Limestone Plant, located in north central Texas.

Sam Thornal, the Grievant in this case, was working at the Limestone Plant at the time of his permanent layoff on June 1, 1992, during a reduction in force (RIF). Thornal became an employee of the company in 1984 when UFI took over its predecessor. At that time, the Grievant was working at the W. A. Parish Plant. Thornal transferred to the Limestone plant in June,

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[1]The Arbitrator was informed in the Company's brief that Utility Fuels was merged into HL&P during the summer of 1993.

1985 as a heavy equipment operator (HEO). The Grievant was given the same seniority date as two other HEOs at Limestone. When Grievant was terminated effective June 1, 1992, this seniority date reflected the highest level of seniority among the HEOs at the Limestone Plant.

In the fall of 1991, a decision was made that HL&P, the Company's primary customer, would cut its costs by 40% based on expenditures for 1991. To accomplish its cost reduction goal, UFI recognized that it would, in all likelihood, have to reduce its labor force. In anticipation of the work force reductions, the Company initiated an employee evaluation process in February of 1992. At the time this process was initiated, no one at UFI knew how many positions (if any) in any particular classification were to be eliminated. The evaluation process consisted of each supervisor's filing out a Special Performance Profile (SPP) for each employee that reported directly to him. The SPPs are broken down into five areas as follows: Evaluation of performance in present job function; Evaluation of job-related personal characteristics; Evaluation of special skills; Evaluation of potential to perform another job function within functional area; and Evaluation of other job-related factors. Criteria

to be considered were provided under each area to be evaluated. A space for comments and space for a point score were also provided for each evaluation element. At the bottom of the SPP is a box for providing an "Overall Evaluation of Ability/Skill/Qualifications" of either above average ("Above Avg"), average ("Avg"), or "Marginal".

According to the Company, it did not know how many employees would be permanently laid off at the time it performed the ratings. When UFI determined how many positions needed to be eliminated in each particular classification, it took those employees rated "marginal" and, by seniority, made termination decisions. If this did not meet the needed reduction, those employees rated "average" were, by seniority, laid off. And, although it did not happen, if more reductions were needed, those employees rated, "above average" would have been laid off by seniority.

Before the RIF, there were sixty-one (61) bargaining unit employees at Limestone. Eleven (11) employees were laid off: one (1) out of the six (6) electricians; one (1) out of the five (5) electrician helpers; two (2) out of the eight (8) HEOs; two (2) out of the ten (10) mechanics; one (1) out of the six mechanics' helpers; none of the four (4) operators; two (2) operators' helpers;

and two (2) out of the five (5) warehousemen. Out of eleven employees laid off, eight (8) were laid off out of seniority order; ten (10) were rated "marginal"; and one (1) was rated "average".

The ratings were not based on a fixed scale of points but rather depended on the supervisor doing the rating and the employee's job classification. For example, the Grievant received a total of nine (9) points which was considered "marginal" in the HEOs' classification, but in the Operator Helper's classification, an employee received only five total points and was rated "average".

UFI determined that 2.19 HEOs at the Limestone Facility needed to be eliminated out of the eight that were then employed. This amounted to the termination of two HEOs at Limestone, with the remaining .19 to be accounted for by a reduction in overtime. The following is the ranking of the eight HEOs; Dillard, 17; Martinez, 15; Boudiette, 14; Payne, 14; Kent, 13; Trammel, 11; Grievant Thornal, 9; and Byers, 5. Both the Grievant and Byers were given ratings of "marginal". Trammel, Kent, Payne, and Boudiette were rated as "average", and Dillard and Martinez received "above average" ratings. As Grievant and Byers were the only HEOs rated "marginal",

and two HEOs needed to go, they were terminated. The other six HEOs retained their jobs.

THE ISSUE BEFORE THE ARBITRATOR

Union's position

The Union's position is that the proper issue before this Arbitrator involves an examination of the entire process utilized by the Company in determining which employees would be selected for layoff, and raises a question as to whether or not that process, itself, also contravenes the terms of the Collective Bargaining Agreement. The Union argues that the case is so constituted as to require the Arbitrator to find that the entire layoff violated the contract and, thus, all persons laid off out of line of seniority are entitled to reinstatement and back pay as well. Specifically, the Union argues that the structure of the grading system utilized by the Company is so vague and ambiguous as to be inherently suspect. The Union contends that the system should have established clear distinctions between levels of employees. The Union argues that by utilizing what appears to be a gradual scale with no defined levels or lines of demarcation, the Company's evaluation process was not designed or intended to separate employees upon a clear difference in "ability, skill, and qualifications", but

was instead intended to allow the supervisors to subjectively determine who they thought were the best employees. In addition, the Union claims that the process as a whole was totally arbitrary.

Company's position

It is the Company's position that the elimination of subjective judgment in the evaluation of employees is virtually impossible. The selection and use of the rating form must be viewed as a reasonable use of managerial authority and discretion. The company argues that the Agreement gives it the right to determine ability, skill and qualifications before applying seniority in a layoff. The Company contends that layoff decisions came at the end of a carefully constructed and implemented process which was designed to meet the Company's legitimate needs for a RIF.

Discussion

Res judicata and precedent

The Company attached the decision of arbitrator Milton Fox in IBEW and Houston Lighting and Power, FMCS 93/00686 (July 1, 1993) to its brief. After the submission of briefs by both parties, the decision of arbitrator Julius Rezler in IBEW and Houston Lighting and Power, FMCS 93/00674 (September 14, 1993) was

decided and furnished to the Arbitrator by counsel for the Company. Arbitrator Rezler held that the decision of Arbitrator Fox constituted res judicata because the case now before him involved "the interpretation of the identical contract provision, between the same company and union" as that considered and decided by Arbitrator Fox. Although, according to the Company's brief, Utility Fuels ceased to exist and was merged into HL&P in the summer of 1993, and although, at the time of the hearing, Utility Fuels and HL&P were siblings, both being owned by parent company, Houston Industries; at the time of the origination of the grievance, Utility Fuels was a separate legal entity. As such, it was a different party from HL&P, thus, even though the contract language is the same, and the Union before this Arbitrator is the same as that before Arbitrators Fox and Rezler, the principle of res judicata does not apply as the Company in this case, Utility Fuels, in law, was not the same at the time of this grievance as the Company before Fox and Rezler.

While the decision of Arbitrator Fox does not present a collateral estoppel to the consideration of the question of the propriety of the evaluation scheme used by the Company, this Arbitrator does agree with Arbitrator Fox as to the nature of the burden of proof of the parties

and the proper manner of interpretation of the layoff provision in this case Article IV, Section 7.

The issues before the Arbitrator

At the outset, the Arbitrator would like to point out that he views this case as presenting a single grievance; that of Sam L. Thornal. It was not a mass grievance filed on behalf of all eight (8) employees laid off out of seniority order. Thus, while the decision of the Arbitrator on the issue of whether the Company violated Article IV, Section 7 of the Collective Bargaining Agreement in the manner in which it conducted the reduction in force, to the limited extent that it has any precedential value, may effect other grievances between the parties, the Arbitrator does not herein propose to assert any authority greater than that which is necessary for the settlement of the grievance of Sam Thornal.

Did the Company violate the Contract in the manner in which it conducted the layoff?

This Arbitrator agrees with both Arbitrators Rezler and Fox that the Collective Bargaining Contract, in this case, Article IV, Section 7, allowed the Company to develop some system of evaluating its employees prior to layoff. The threshold question, hence, is not whether the company could legitimately develop a plan for determining

"ability, skill, and qualifications" but whether the procedure chosen, on its face, was clearly violative of the contract or was otherwise inappropriate in that it was arbitrary, capricious, or discriminatory. The Arbitrator believes that the procedures utilized by the company were, on their face, reasonably calculated to fairly accomplish the determination of "ability, skill and qualifications" consistent with the requirements of the Contract. Whether an employee is equivalent to another employee poses a difficult question. Nonetheless, although some subjective judgement may be unavoidable, objectivity in the process must be the decisive component.

In examining the SPPs, this Arbitrator finds that the criteria considered is within the scope of the contractually allowable factors of an employee's "ability, skill, and qualifications". The criteria the Union questions are "interface with others"; "willingness to perform beyond routine requirements of current job;" "transferability of job knowledge or experience"; "multiple skills"; "absenteeism"; and "recent change to present position". Except for "recent change to present position", all of the foregoing criteria, arguably, relate to the employee's *ability* to get the job done. Although this Arbitrator does not see the purpose of considering whether an employee had a "recent

change to present position", this single objectionable criterion under one of the five elements of evaluation is not sufficient to render the entire scheme impermissible on its face.

The Arbitrator accepts the Company's position that it had a right to construct a process for the determination of relative job abilities of its employees and that the plan as constituted was contractually acceptable, however, the Arbitrator is troubled by the manner in which the plan was actually implemented. The notion that there were to be no ties, that each classification should have an equal distribution of "above average", "average", and "marginal", and that the supervisors were to be happy with the rankings because the employees not terminated would be working at Limestone for a long time, raises some serious questions as to whether the process, while capable of fairness on its face, was, in actuality arbitrary and unjust in its application. It would have been possible for employees in the same job classification to receive equal points, thus, in theory, making the employees equal. Now if there were eight (8) employees in the same classification and they all scored nine (9) total points, the supervisors would have to break all ties. There would therefore be eight different scores. Moreover, if ratings had to be

equally distributed, then the result could be two ratings of "marginal", three ratings of "average", and three ratings of "above average". In such a scenario, it would have been possible for the most senior employees to receive "marginal" ratings, resulting in their being terminated, even though initially it was determined that all eight (8) employees were equal in "ability, skill and qualifications". Such a result as this, clearly would have violated the Contract.

However, in actual application of the procedure, this was not the case as all the ties occurred where employees received a high number of total points and were reasonably safe from termination. Two electricians tied at fourteen (14) total points. The one electrician rated "marginal" scored only six (6) points. Two HEOs tied at fourteen (14) total points. The HEO with the highest point total who was rated "marginal" scored nine (9) points. Three mechanics tied at thirteen (13) points. The mechanic's highest "marginal" score was five(5). Three Ops. helpers tied at thirteen (13) and three tied at eleven (11). Ops. helpers highest "marginal" score was three (3). The two highest warehousemen tied at sixteen (16). The highest scoring warehouseman that was terminated scored (12). Thus, whether any of these ties

are broken or not, the employees that tied were not going to be affected and the results would not have changed.

The Union also argues that the Company conducted the process unreasonably by establishing ratings of relative equality and then evenly distributing the ratings. Under Article IV, "the Company shall determine ability, skill and qualifications, subject to an employee's right to assert a grievance under Article II." As will be discussed, this Arbitrator finds that the notion of relative equality is reasonable and is the type of seniority clause the parties have negotiated. Additionally, while the supervisors may have been told to distribute the ratings evenly, the fact is the ratings were not distributed evenly. The Arbitrator is of the opinion that the Union failed to substantiate its position that the Company's evaluation process, on its face, constituted a violation of the Collective Bargaining Contract or was arbitrary, unreasonable, or unjust.

A layoff that results in 73% (8 Of 11) of those affected being laid off out of seniority order certainly raises a strong inference that the ratings were applied in a biased manner. However, having decided that the evaluation system was not invalid on its face, it is not possible to decide the issue of the application of the

scheme to the other seven employees so situated as the Grievant without their being before the Arbitrator. It has been ruled that the scheme of evaluation was proper on its face. This means that it was capable of being applied in a valid manner. The only process of determining whether it was, in fact, applied improperly, on the whole, would require that the entire record of the evaluations of all 61 employees working at the facility at the time of the layoff be properly before the Arbitrator for consideration. In the absence of such a proceedings, the order and demarcation lines the Company chose, as in this case involving the Grievant Sam Thornal, will have be to examined on an individual basis to determine whether the Company conducted the evaluations arbitrarily as to that particular grievant. Thus, while it was necessary to consider the propriety of the evaluation process on its face before determining the reasonableness of its application to the Grievant, no determination of the whole process as applied is either appropriate or possible at this time.

THORNAL'S LAYOFF

The Arbitrator will now move forward to a consideration of whether the Company violated the Collective Bargaining Agreement in laying off Sam Thornal out of line of seniority?

Burden of Proof Issue

Union's position

The Union argues that "the burden of proof in this case is upon the Company, once it has established, as is undisputed, that the Grievant had greater seniority than a number of other employees who were not laid off, to show that the Grievant's relative "ability, skill and qualifications" were clearly inferior to those employees who were not laid off." Further, it is the Union's position that the Company has failed to satisfy this burden and as a result, the grievance must be sustained.

Company's position

The Company argues that as "the Agreement expressly grants it the right to determine, ability, skill, and qualifications, the Union bears the burden of proof when it challenges the Company's determination."

Discussion regarding burden of proof

In contract interpretation cases, the burden of proof and of going forward is on the party initiating the action. However, that initial burden is satisfied once a prima facie case has been established. In determining whether sufficient evidence to constitute a prima facie case has been presented, it is necessary to first consider the theory upon which the moving party's action is premised. It must

then be determined whether that which has been presented, if taken to be true, is sufficient, in the absence of rebuttal, to warrant a ruling in favor of that party. Once that threshold has been crossed, the opposing party has the burden of going forward to offset that prima facie case. In this Instance, the Union's theory is that the Company has violated the Collective Bargaining Contract by laying off a senior employee while retaining a junior employee. In a case such as this, and here this Arbitrator agrees with Milton Fox that the clause involved is a "relative ability" seniority provision, the Union has met its burden of proof when it has established that the Grievant was laid off out of line of seniority. This it has done. And once that has been done, the Company has the burden of showing that pursuant to the Contract, the "skills, ability, and qualifications" of the employee so bypassed were not equal to those of the junior employees it has chosen to retain.

Thornal's evaluation

Company's position

As set forth in its brief, "it is the Company's position that in determining Grievant's ability, skill and qualifications, and in selecting him for termination in the RIF, the Company did not unreasonably and unjustly

discriminate against Grievant and thus did not breach the contract."

Union's position

It is the Union's position that the Company has failed to establish a justification for the Grievant's "marginal" rating. The Union argues that it is essentially undisputed that Grievant was at least average, if not above average in this ability, skill and qualifications as a Heavy Equipment Operator. Additionally, the Union contends that it has been shown that the Grievant had better skills and was better able to perform his job than at least one employee below him in seniority who retained his job and this, alone, is sufficient to warrant sustaining the grievance of Sam Thornal.

DISCUSSION AS TO THORNAL'S EVALUATION

To determine whether the Company's evaluation process was, indeed, conducted in an unjust and arbitrary manner against the Grievant, it is necessary to examine the SPPs and consider the scores given to the HEOs. The comments written on the SPPs offer some suggestion of what the supervisors considered to determine the particular point scores.

Ronnie Dillard scored the highest total points among the HEOs. He received the highest points allowed

on the "Personal characteristic element", 5 points. For this factor, the supervisor wrote in the comments, ". . . [h]e has trained several operators. . ." Grievant scored only 1 point on this factor. The supervisor wrote, "he doesn't always use his best judgment on lignite pile." Grievant trained HEO Trammel and other HEOs that were not laid off. Apparently, the supervisor thought Dillard's willingness to perform beyond what he considered to be the routine requirements of the job, i.e., the training of other operators, very significant. However, this fact was not mentioned, and apparently not considered for Grievant although seemingly one of the major determinant for Dillard's receiving 5 points on this element of evaluation. On the "evaluation of other job-related factors", Dillard received +2. In the comment section, the supervisor wrote, "Good judgment, willingness to work with others, has trained several others." However, although "judgment" was listed among criteria for the personal characteristics factor, it was not included under other job-related factors. Additionally, Dillard was again cited for having "trained several others", although this was ostensibly one of the reasons why he received a perfect score of "5" on the "Personal characteristics" factor. This improper double positive consideration of criteria, in effect, allowed Dillard

to receive 7 points on the "Personal characteristics" and "Other job-related factor" while the Grievant on the other hand was penalized by an improper double negative consideration and received only 1 point on these two factors. The Grievant, in fact, received zero (0) points on the "Other job-related factors". The supervisor wrote, "Does not always use the best judgment. . ." In giving Thornal a score of "1" on "Job-related personal characteristics", he had written "[h]e does not always use his best judgment on lignite pile." The supervisor thus negatively considered Grievant's "judgment" twice with devastating effects on his evaluation of him. He considered it once where it was listed as a criteria, and a second time where it was not listed as a criteria. In fact, on the very first element, "Performance in present job", the supervisor, after commenting that Grievant's "ability to operate heavy equipment is above average," went on to note that "[h]e isn't always willing to manage lignite pile as directed by supervision." Thus, it could be argued that the "judgment" criteria was applied for a third time and limited Grievant to a "7" on the first element of evaluation.

Steve Payne and Steve Trammel both received +2 points on the "Other job-related factors". The supervisor

commented on both as to their lack of an absenteeism problem. The evidence reflects that Grievant had an excellent attendance record. In fact, the Performance Appraisal Forms for 1988 and 1990 show that a good attendance record was a goal for Grievant. Yet Grievant received zero points on the factor where consideration of one's attendance record was a stated criteria and no comment was made of his excellent record. The supervisor, thus, appeared to have arbitrarily determined to position the Grievant in such a manner as to deliberately and unreasonably deprive him of the necessary points to reach an "average" rating. It is very difficult for this Arbitrator to understand how an employee of Thornal's acknowledged ability to perform his assigned work at a level equal to or above the level of the other HEOs would receive an overall rating of "marginal" even on a comparative basis. It is obvious that Grievant's supervisor was unwilling to consider his positive features and give him credit for his strengths of good attendance and training other employees. He used the latter criteria to doubly reward Dillard. On the other hand, that supervisor was more than willing to penalize the Grievant twice and, perhaps three times, for his alleged lack of "judgment". Much of the negative testimony about this

nineteen year employee's lack of judgment, inability to get along, unwillingness to accept authority, and headstrong desire to do things his way, struck the Arbitrator as an ex post facto attempt to paint the Grievant as an unsatisfactory employee to justify the action taken rather than a straight forward effort to place him in an honest objective light.

It is the opinion of this Arbitrator that the Union met its threshold burden of establishing that the Grievant was laid off out of the line of seniority. Furthermore, the parties having negotiated an agreement setting up a "relative ability" seniority system for layoffs, the Company had the burden of showing that the Grievant deserved a rating of "marginal", permitting it to lay him off while retaining HEOs with less seniority. This it has failed to do. The Company has not carried its burden of showing that the Grievant was indeed "marginal" and that the employees with less seniority, like Trammel, were entitled to a higher rating of at least "average". The Arbitrator has already indicated that he accepts that the scheme of evaluation developed by the Company was legitimate on its face. However, as the evaluation process was applied under the concept of "relative ability", the Arbitrator does not accept that the Company's decision to terminate the

Grievant while retaining Trammel was a reasonable one. Even without finding that the Company improperly rated Thornal, and accepting that the HEO supervisor had the right to make a subjective line of demarcation between "marginal" and "average", it is still difficult to comprehend that an employee with a score of "9" is not relatively equal to one with a score of "11". The question then to be answered, particularly as there was no objective scores for the categories, is why were they both not rated as "average"? This is even harder to understand when it is noted that Byers, who received a score of "5", four points below the Grievant, was, for rating purposes, considered relatively equal to the Grievant, they both were "marginal", and yet the Grievant, was only two points below Trammel, was not considered relatively equal in ability to Trammel. As applied, without any predetermined objective scores for placing employees into rating categories, there was simply too much room for mischief. The Company in its application of the evaluation process to the Grievant was unreasonable both in its rating of him and in assigning him to the category of "marginal".

The Arbitrator routinely hears annual appraisal grievances in the federal public sector. In those cases, if

the Arbitrator finds that the grievant has not been accurately and fairly appraised in accordance with law, rule, regulation, or the parties Master Labor Agreement, he is to set aside the rating. Once having decided to set aside the rating, the Arbitrator must then decide whether he is able to determine from the record before him what the performance appraisal would have been but for management's violation. If he can make such a determination, he may order the appraisal rating that he believes is appropriate. If the Arbitrator is not able to determine from the record what the performance appraisal would have been but for management's violation, he must remand the case to management for reevaluation consistent with his opinion. In this case, the Arbitrator finds that the Company did not give the Grievant a fair appraisal. Moreover, the Arbitrator is able to determine from the record, at least what the minimum performance rating should have been. The Grievant should have received no less that (2) on "Job-related characteristics". This is based on the fact that "judgment" is only one of nine (9) listed criteria and a deficiency in this one factor should not exercise such a negative effect on this element, particularly as it was cited on "Performance in present job function" and presumably caused the Grievant at least a

point on that element. On the element of "Other job-related factors", the Grievant should have been assigned, at minimum, a +2. This is based on the fact that "judgment", which has been used negatively against the Grievant on one and, possibly two, other occasions, is not a criteria for this evaluation factor and should not have been cited. On the other hand, the Grievant should have received the same credit for low absenteeism as was assigned to Trammel. Additionally, the Grievant should have been awarded credit for having trained others as was given to Dillard. These are minimum score changes that the Arbitrator would make based on the record before him. With these corrections, the Grievant is raised 3 points to "12" which puts him into the "average" category and ahead of Trammel.

Moreover, regardless of the Arbitrator's ability to determine from the record before him the rating that is appropriate for Grievant, the Company has not carried its burden of proof that Grievant should receive a lower rating than Trammel. The evidence supports a finding that based on ability, skill and qualifications, the Grievant should, at minimum, be no lower than the category into which Trammel was placed, thus, forcing the evaluator to consider seniority. As Grievant had more seniority than

Trammel, he should have been terminated before Grievant. This is all that need be shown to warrant a finding in favor of the Grievant.

AWARD

Having found that the Company acted unreasonably and unjustly in the manner that it applied its layoff evaluation process to the Grievant, it was not justified in laying off the Grievant out of line with his seniority while retaining employees with less seniority. Accordingly, the grievance is sustained. The Grievant is to be reinstated with backpay and seniority and such other benefits as to which he would have been entitled but for being permanently laid off.

The Arbitrator retains jurisdiction for the sole and limited purpose of providing such further relief as may be necessary in the implementation of this award.

Decided this 31st day of December, 1993 in Houston, Texas.

SIGNED: s/OTIS H. KING, ARBITRATOR

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-20693

THE HOUSTON LIGHTING & POWER COMPANY, aka Utility Fuels, Inc., aka Houston Industries, Inc.,

Plaintiff-Appellant,

versus

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, Local Union No. 66,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING

(January 8, 1996)

Before LAY*, DUHÉ and DeMOSS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above cause is denied.

ENTERED FOR THE COURT:

s/HAROLD E. DeMOSS, JR.
UNITED STATES CIRCUIT JUDGE

*Senior Judge of the United States Court of Appeals from the Eighth Circuit, sitting by designation.

Section 301 of the Labor Management Relations Act is as follows:

"SEC. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and

against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpoena, or other legal process of any court of the United Sates upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts,

the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." 29 U.S.C. §185

Section 203(d) of the Labor Management Relations Act of 1947, as amended, states:

> "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." 29 U.S.C. §173(d)

Supreme Court, U.S.
FILED
MAY 29 1996
CLERK

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NO. 95-1757

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 66,
Petitioner,

v.

HOUSTON LIGHTING & POWER COMPANY, A SUBSIDIARY OF HOUSTON INDUSTRIES INCORPORATED, AS SUCCESSOR IN INTEREST TO UTILITY FUELS, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Fifth Circuit correctly held that an arbitration award did not draw its essence from the collective bargaining agreement when the arbitrator decided an issue excepted from his jurisdiction and when he drew on extra-contractual sources to support his authority to re-evaluate the qualifications of the grievant.

PARTIES TO THE PROCEEDINGS

Petitioner:

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 66

Respondent:

HOUSTON LIGHTING & POWER COMPANY, A SUBSIDIARY OF HOUSTON INDUSTRIES INCORPORATED, AS SUCCESSOR IN INTEREST TO UTILITY FUELS, INC.

RULE 29.6 LIST

Entities Affiliated With Respondent:

DEVELOPMENT VENTURES, INC.; HL&P ENERGY SERVICES CO.; HOUSTON INDUSTRIES INCORPORATED; HOUSTON INDUSTRIES FINANCE, INC.; HOUSTON INDUSTRIES ENERGY, INC.; AND UTILITY FUELS, INC.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 71 F.3d 179 (5th Cir. 1995). The opinion of the district court is unreported, as is the arbitration award at issue. The three opinions appear as Appendices 1-3 to Petitioner's Petition for Certiorari.

JURISDICTION

The district court had jurisdiction of this case pursuant to 28 U.S.C. § 1331 in that this action arose under the laws of the United States, specifically the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185 (1988), as a suit to set aside an arbitration award. The court of appeals had jurisdiction to review the district court's final judgment under 28 U.S.C. § 1291. Petitioner attempts to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED IN THIS CASE

This case implicates § 301 of the LMRA, 29 U.S.C. § 185, because it is an action by an employer to set aside an arbitration award issued pursuant to the grievance-and-arbitration machinery of a collective bargaining agreement ("CBA") between Petitioner and Respondent.

STATEMENT OF THE CASE

A. *Course of Proceedings and Disposition in the Courts Below.*

Petitioner International Brotherhood of Electrical Workers, Local Union No. 66 ("Union") correctly notes in its Petition that this case arose from a grievance relating to the termination of Sam Thornal ("Thornal"), an employee of Respondent Houston Lighting & Power

Company's ("Company") predecessor, Utility Fuels, Inc., as part of a reduction-in-force ("RIF") in 1992. Moreover, the Union accurately observes that Thornal's grievance proceeded to arbitration before Arbitrator Otis H. King, who ultimately sustained the grievance and ordered the Company to reinstate the Grievant.

However, the Union's Petition neglects to mention that the parties did not agree on the scope of the submission of issues to be arbitrated. The Union contended that the issue for resolution was whether the entire 1992 RIF, as well as Thornal's individual layoff, violated the collective bargaining agreement ("CBA") between the Company and the Union. (*See* Union's Pet., App. 3, at 2.) By contrast, the Company averred that the only issue presented for the arbitrator was whether the Company "unreasonably and unjustly discriminated against [the] Grievant . . . ." (*Id.*) In sustaining the grievance, the arbitrator neither discussed nor apparently considered the Company's version of the issue, focusing instead only on the version proffered by the Union. Importantly, the arbitrator ruled in favor of Thornal even though he explicitly found that the RIF process as a whole was permissible under the CBA and was facially fair.

The district court agreed with the Union's argument that Arbitrator King's award drew its essence from the CBA. On appeal, however, the Fifth Circuit carefully considered the scope of submission and arbitrability issues that the district court apparently ignored, and it held that the arbitrator exceeded the scope of his authority by re-evaluating Thornal's qualifications and re-ranking him for RIF purposes since this was a right reserved exclusively to the Company under the CBA. The Fifth Circuit alternatively observed that the award violated the "essence" test since the arbitrator invoked the terms of an entirely different CBA to

justify his reassessment of Thornal's abilities, skills, and qualifications.

B. *Statement of Facts.*

Respondent incorporates by reference the factual background set forth in the Fifth Circuit's majority opinion, 71 F.3d at 180-81.

REASONS WHY PETITION SHOULD BE DENIED

A. The Fifth Circuit's Decision Adheres to the Requirements of the *Steelworkers Trilogy*.

1. *The Fifth Circuit Expressly Recognized and Correctly Applied the Principle of Limited Judicial Review of Arbitration Awards.*

In attempting to obtain review by the Court, the Union relies almost exclusively on the contention that the Fifth Circuit's decision conflicts with the Supreme Court's holdings in the *Steelworkers Trilogy*.[1] (Union's Pet. at 16.) This argument wholly lacks merit because the Fifth Circuit acted fully in accordance with the letter and spirit of the *Trilogy*.

In outlining the basis for its decision, the Fifth Circuit first noted that judicial review of arbitration awards is limited. *Houston Lighting & Power Co.*, 71 F.3d at 182; *see also Enterprise Wheel*, 363 U.S. at 597. The Fifth

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[1] The *Steelworkers Trilogy* consists of *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564 (1960).

Circuit then observed that a court cannot second-guess an arbitrator's factual determinations or his interpretation of a CBA as it relates to the merits of a grievance as long as the award "draws its essence from the collective bargaining agreement." 71 F.3d at 182; *see also Enterprise Wheel*, 363 U.S. at 597 (same). Consequently, pursuant to this Court's pronouncements, the Fifth Circuit exercised its power to enforce the jurisdictional limits imposed on the arbitrator by the CBA, i.e., it proceeded to determine "whether the arbitrator exceeded his authority under the Agreement when he re-evaluated Thornal's qualifications and re-calculated his performance rating." 71 F.3d at 182. In a straightforward construction of the CBA, the Fifth Circuit held that "[t]he Company has the exclusive right to make the employee qualification determinations" under Art. IV, § 7 of this particular CBA, without "confer[ring] upon the arbitrator the right to make a *de novo* determination of the employee's qualifications." *Id.* at 184. Although the Union argues that this action amounted to an improper "indulg[ence] in a comparative analysis between multiple contractual provisions,"[2] in actuality the Fifth Circuit displayed scrupulous faithfulness to this Court's labor law jurisprudence.

2. *Deciding the Arbitrability of the Grievance Required the Court to Examine the CBA's Limitations on Arbitral Authority.*

The authority for the Fifth Circuit to consider the scope of the arbitrator's jurisdiction under the CBA derives directly from this Court's instruction "to refuse enforcement of the award" when an "arbitrator's words manifest an infidelity" to the limitations imposed by the CBA. *Enterprise Wheel*, 363 U.S. at 597. The *Trilogy*'s

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[2] Union's Pet. at 23.

explicit reservation of authority concerning the finality to be afforded arbitration awards stems largely from the notion that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit." *Warrior & Gulf*, 363 U.S. at 582.[3] Thus, the judicial inquiry focuses on "whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator the power to make the award he made." *Id.* *See also American Mfg. Co.*, 363 U.S. at 564 (describing the judiciary's role as "ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract").

Significantly, the principle of refusing to bind a party to an award that exceeds the scope of the submission has not eroded over time, as evidenced by its reaffirmation in *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986).[4] In *Communications Workers*, the Court considered whether the layoff provision of a labor contract presented an arbitrable dispute. 475 U.S.

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[3] As commentators have observed, "[n]otwithstanding this paean to arbitral competence, the *Enterprise* Court made clear that the arbitrator's judgment is not absolutely unreversible . . . . The Court wished to spare arbitrating parties from an award which altogether deviated from the collective bargaining agreement, and therefore preserved a limited scope of judicial review as a safety valve." Michael H. LeRoy & Peter Feuille, *The Steelworkers Trilogy and Grievance Arbitration Appeals: How the Federal Courts Respond*, 13 Indus. Rel. L.J. 78, 96 (1991) (citing *Enterprise Wheel*, 363 U.S. at 597).

[4] *See also First Options of Chicago, Inc. v. Kaplan*, 115 S.Ct. 1920, 1924 (1995) ("[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes -- but only those disputes -- that the parties have agreed to submit to arbitration."); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 744 (1981) ("An arbitrator's power is both derived from, and limited by, the collective-bargaining agreement.").

at 652. In reversing the court of appeals, the Court held that "[t]his issue should have been decided by the District Court and reviewed by the Court of Appeals; it should not have been referred to the arbitrator." *Id.* Likewise, in the present case the Company never agreed to submit the issue of Thornal's abilities, skills, and qualifications for review by the arbitrator; that determination was reserved to the Company by art. IV, § 7 of the CBA. 71 F.3d at 182 ("The Company shall determine ability, skill and qualifications. . . ."). As a result, it was the Fifth Circuit's duty to review the labor contract and decide whether the qualifications issue was one on which the arbitrator had jurisdiction to pass. Having determined that the power to re-evaluate Thornal was beyond the arbitrator's purview, the Court of Appeals had no choice but "to refuse enforcement of the award." *Enterprise Wheel*, 363 U.S. at 597. Thus, judicial scrutiny of arbitration awards to determine whether the arbitrator exceeded the scope of his contractual authority constitutes an integral part of the teachings of the *Steelworkers Trilogy*, and the Fifth Circuit's unremarkable application of this rule does not warrant a place on this Court's docket.

3. *Leaving Arbitrability Questions to the Courts Fosters, Rather than Discourages, Industrial Peace.*

In conducting an analysis under the "essence" test, the Fifth Circuit also followed "[t]he second rule [from the *Trilogy*, which] . . . is that the question of arbitrability - whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance--is undeniably an issue for judicial determination." *Communications Workers*, 475 U.S. at 649. *See also Warrior & Gulf*, 363 U.S. at 583 n.7 ("[T]he question of arbitrability is for the courts to decide."). The soundness of this rule is now beyond peradventure. Indeed, if courts were not free to

assess the arbitrability issue, the parties to a CBA would be less likely to agree to arbitrate at all, frustrating the national policy favoring the grievance-and-arbitration machinery in order to achieve industrial peace.[5] As this Court has stated, "[t]he willingness of parties to enter into agreements that provide for arbitration of specified disputes would be 'drastically reduced,' however, if a labor arbitrator had the 'power to determine his own jurisdiction.'" *Communications Workers*, 475 at 651 (quoting Archibald Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1509 (1959)). Consequently, "the conventional arbitration clause limiting the arbitrator to disputes concerning 'interpretation and application' of the contract reserves the right to a judicial determination upon whether the arbitrator has jurisdiction over the subject matter . . . ." Cox, 72 Harv. L. Rev. at 1511.

The Union apparently favors a contrary rule under which the only check on an arbitrator's potential abuse of power is a review in which a court "limit[s] itself" to a consideration of only one clause of the CBA, i.e., art. II, § 4 concerning an arbitrator's function, without regard to other proscriptions on arbitral authority in the labor contract. (Union's Pet. at 24.) Specifically, the Union asks whether a court should engage in "extensive analysis of the collective bargaining agreement, including the contractual provisions involved in the underlying arbitration award," or whether a court should merely ask whether the award "draws its essence" from the CBA. (Union's Pet. at i.) The decisions of this Court demonstrate that the Union's proposed inquiry misses the mark on both counts. Courts must analyze the

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[5] *See* 29 U.S.C. § 173(d) (1988); *Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368, 377 (1974) ("The federal policy favoring arbitration of labor disputes is firmly grounded in congressional command.").

provisions of a CBA, even those apparently dealing with the disputed issue, in order to determine whether the issue presented is one that the parties agreed to resolve through arbitration. *See Communications Workers*, 475 U.S. at 651 ("It is the court's duty to interpret the agreement and to determine whether the parties intended to arbitrate grievances concerning layoffs . . . ."); *see also First Options*, 115 S. Ct. at 1923 ("[A] party who has not agreed to arbitrate will normally have a right to a Court's decision about the merits of its dispute," such as a party's "obligations under a contract."). Thus, contrary to the Union's suggestion, "the reviewing court must examine the pertinent contract language as well as relevant negotiating history and other collateral evidence. In other words, the court needs to look carefully at the same kind of evidence that otherwise would be reviewed in arbitration." LeRoy & Feuille, 13 Indus. Rel. L.J. at 95.[6]

Pursuant to this understanding, since the *Steelworkers Trilogy*, this Court has construed the terms of collective bargaining agreements in order to determine whether particular disputes were within the scope of an arbitrator's authority. For example, in *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987), the Court rejected the company's argument that the award should

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[6] *See also* Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 Mich. L. Rev. 1137, 1148 (1977) ("in insisting that an enforceable award must 'draw its essence from the collective bargaining agreement' . . . the court plainly appeared to authorize *some* substantive evaluation."); Cox, 72 Harv. L. Rev. at 1509-10 (stating that, in order to give effect to the underlying purpose of an arbitration cause, the law excepts interpretation of the arbitration clause "from the general power to interpret, thus giving the court the duty to determine whether the claim which one side wishes to arbitrate gives rise to a dispute concerning the 'interpretation and application' of the collective bargaining agreement").

be vacated because of erroneous factual findings by the arbitrator. Nevertheless, when discussing the company's argument that the contract, by specifically listing the charged offense as a cause for discharge, precluded the arbitrator from mitigating the company's chosen penalty, the Court noted that "[t]he parties, of course, may limit the discretion of the arbitrator in this respect; and it may be, as the Company argues, that under the contract involved here, it was within the unreviewable discretion of management to discharge an employee once a violation of Rule 11.1 was found." 484 U.S. at 41.[7] The Court's statement evinces a willingness to vacate arbitration awards that encroach upon matters removed from the arbitrator's control by the collective bargaining agreement.[8] In sum, "[a]n arbitral award is also subject to judicial vacation for want of authority if it reaches beyond the boundaries of the 'submission,' the statement of the issue as agreed upon by the parties." St. Antoine, 75 Mich. L. Rev. at 1151.

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[7] In *Misco*, the Court refused to consider the company's arguments regarding the scope of the arbitrator's authority because "the parties stipulated that the issue before the arbitrator was whether there was 'just' cause for the discharge." 484 U.S. at 41. By contrast, in the instant case the Company refused to stipulate to the Union's broad submission at the arbitration. Instead, the Company attempted to confine the arbitrator to the parameters of the CBA by defining the issue as follows: "Did the Company unreasonably and unjustly discriminate against the grievant by terminating him while retaining less senior heavy equipment operators?" (Union's Pet., App. 3, at 2.)

[8] Similarly, a number of decisions of this Court have expressly relied on the *Steelworkers Trilogy* to support review of collective bargaining agreement terms in determining arbitrability. *See, e.g., Communications Workers*, 475 U.S. at 648-49; *International Union of Operating Eng'rs, Local 150 v. Flair Builders, Inc.*, 406 U.S. 487, 491 (1972); *John Wiley & Sons v. Livingston*, 376 U.S. 543, 546-47 (1964).

In the case at bar, the constraint on Arbitrator King's power to reassess Thornal's capabilities plainly appears in art. IV, § 7 of the CBA, mandating vacatur of the award, which sought to circumvent this contractual limitation under the guise of the arbitrator's "own brand of industrial justice." *Enterprise Wheel*, 363 U.S. at 597. Thus, the Union's assertion that the Fifth Circuit's opinion in this case represents a departure from the *Steelworkers Trilogy* is without merit because, "whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Courts, on the basis of the contract entered into by the parties." *John Wiley & Sons*, 376 U.S. at 546-47.

B. There is No Conflict Among the Circuit Courts of Appeals.

The decisions from other courts of appeals also support the Fifth Circuit's application of the *Steelworkers Trilogy* in the instant case. The various circuit courts have consistently construed the *Steelworkers Trilogy's* limitation on the power of the courts to review the merits of arbitration awards as "an admonition concerning the merits of the controversy rather than any jurisdictional prerequisites imposed by the arbitration agreement." *Container Prods., Inc. v. United Steelworkers of Am.*, 873 F.2d 818, 820 (5th Cir. 1989). Thus, "vacation or modification of an arbitration award is clearly proper where the arbitrator has exceeded his authority." *Id.*[9] Although the Union argues that the Fifth

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[9] *See also Polk Bros. v. Chicago Truck Drivers Union*, 973 F.2d 593, 597-98 (7th Cir. 1992) (holding that arbitration decision did not draw its essence from the terms of the agreement where the arbitrator "went well beyond his authority under the agreement"); *Harry Hoffman Printing, Inc. v. Graphic Communications Int'l Union, Local 261*, 950 F.2d 95, 98 (2d Cir. 1991) (vacating an arbitration award where the arbitrators "did

Circuit decision directly conflicts with the *Trilogy*, it has failed to cite any contrary authority. Instead, a review of the authorities reveals that the Fifth Circuit's analysis comports with the overwhelming weight of authority in holding that the *Trilogy* allows—indeed requires—courts to enforce the contractual limitations on arbitral authority.

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not merely misapply principles of contractual interpretation or misinterpret the CBA, but drew upon a concept upon which [they were] not entitled to rely"); *Delta Queen Steamboat Co. v. District 2 Marine Eng'rs Beneficial Ass'n*, 889 F.2d 599, 602 (5th Cir. 1989) (stating that "[f]ederal courts are free to scrutinize the award to ensure that the arbitrator acted in conformity with the jurisdictional prerequisites of the collective bargaining agreement. Where an arbitrator exceeds his contractual authority, vacation or modification of the award is an appropriate remedy") (citations omitted), *cert. denied*, 498 U.S. 853 (1990); *Georgia Pacific Corp. v. Local 27 United Paperworkers Int'l Union*, 864 F.2d 940, 945-46 (1st Cir. 1988) (vacating award where arbitrator substituted his "normal authority" for explicit terms of the CBA); *Bruno's, Inc. v. United Food & Commercial Workers Int'l Union, Local 1657*, 858 F.2d 1529, 1532 (11th Cir. 1988) (vacating arbitration award that imposed a new work rule where the CBA vested in the employer the right to establish and maintain reasonable rules of operation); *Trailways Lines, Inc. v. Trailways, Inc. Joint Council*, 807 F.2d 1416 (8th Cir. 1986); *Frederick Meiswinkel Inc. v. Laborers Union Local 261*, 744 F.2d 1374, 1377 (9th Cir. 1984) (stating that "an arbitrator may decide only those issues submitted to arbitration, and [ ] courts will refuse to enforce an award when the arbitrator exceeds its power") (citations omitted), *cert. denied*, 470 U.S. 1028 (1985); *Local 342, United Auto. Workers v. T.R.W., Inc.*, 402 F.2d 727, 730 (6th Cir. 1968) (holding that, where the CBA gave the company the right to discharge some or all employees who engaged in an illegal strike, "it was not for an arbitrator to add to the contract a provision" requiring the company to announce supportable reasons for its selections), *cert. denied*, 395 U.S. 910 (1969).

C. The Fifth Circuit's Conclusion That the Arbitrator Exceeded His Authority was Correct.

In this case, art. IV, § 7 of the CBA states that,

> In the event of promotions, layoffs, or a permanent reduction in the working force at a facility, where ability, skill and qualifications are equal, length of service at the facility shall govern. . . .*The Company shall determine ability, skill and qualifications* subject to an employee's right to assert a grievance under Article II . . . .

71 F.3d at 182. The CBA therefore reserves to "[t]he Company" the right to evaluate its employees for layoff, subject only to the art. II grievance procedures. Art. II, § 1 of the CBA, defines a "grievance" as "any dispute involving the proper application or interpretation of this Agreement, or a claim that an employee has been unreasonably and unjustly discriminated against." *Id.*[10] Thus, as the Fifth Circuit

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[10] In addition, the "Purpose" section of the CBA provides that "there shall be no discrimination by the Company, Union, or any other employee because of race, color, religion, sex, or national origin." *Id.* Furthermore, the CBA restricted the arbitrator's authority through an exclusive rule-making clause (art. III, § 5), which provides that

> [t]he Company shall have the exclusive right to determine its operating policies and manage its business in the light of experience, business judgment and changing conditions consistent with the terms and conditions of this Agreement. The Company shall retain all right, power and authority not specifically relinquished in this Agreement.

concluded, this CBA limits an employee's right to contest his selection for termination in a RIF to one or both of two contentions: (1) that the system used to evaluate an employee's capabilities was "inconsistent with the terms of the Agreement or . . . [was] an improper application of the Agreement," or (2) that the Company discriminated against him "because of race, color, religion, sex, or national origin in the evaluation process." *Id.*

In this case, the arbitrator's award reveals that his decision was not based on either of these permissible bases for a grievance. With regard to the first consideration, the arbitrator concluded "that the procedures utilized by the company were, on their face, reasonably calculated to fairly accomplish the determination of 'ability, skill and qualifications' consistent with the requirements of the Contract." (Union's Pet., App. 3, at 12.) With regard to the second consideration under art. II, the Fifth Circuit correctly noted that "the Union has not raised a claim of discrimination. Nor has the arbitrator discussed discrimination in his findings." 71 F.3d at 184. Because the arbitrator's decision was not based on either of the two permissible considerations, the finding of wrongful

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71 F.3d at 182. Also, the CBA contains a "zipper" clause (art. II, § 4) that prohibits an arbitrator from modifying the contract:

> The sole function of the arbitrators shall be to determine whether the Company or the Union is correct with reference to the proper application and interpretation of this Agreement and the arbitrators shall not have any authority to change, amend, modify, supplement or otherwise alter in any respect whatsoever this Agreement, or any part thereof.

Id. Thus, by rejecting the CBA's clear limits on his authority, the arbitrator impermissibly attempted to amend the CBA, requiring vacatur of his award.

termination constituted an ultra vires act, which the Fifth Circuit properly vacated.

Many courts have held that, when an arbitrator's award encroaches upon authority vested solely in one of the parties, vacatur of the award constitutes the proper remedy. *See, e.g., Delta Queen Steamboat*, 889 F.2d at 604; *Bruno's, Inc.*, 858 F.2d at 1532; *S. D. Warren Co. v. United Paperworkers' Int'l Union*, Local 1069, 845 F.2d 3, 5 (1st Cir.), *cert. denied*, 488 U.S. 992 (1988). For example, in *Bruno's* the union challenged a disciplinary rule imposed by the company. 858 F.2d at 1530-31. The arbitrator found that the rule was unfair and void, and he outlined a new policy to take its place. *Id.* In the company's suit to vacate the arbitrator's award, the court held that:

> The agreement between the Union and Bruno's provides that "the right to establish and maintain reasonable rules and regulations covering the operation of the stores is vested in the Employer" . . . **This clause bars anyone other than Bruno's, including an arbitrator, from setting up store rules and operating procedures. The clause constrains both Bruno's and the arbitrator.** Bruno's may not impose an unfair rule, and the **arbitrator may not create a new rule to replace one he strikes down as unreasonable.** Although we are mindful of the great latitude to be given to an arbitrator's interpretation of a collective bargaining agreement, **the portion of the arbitrator's award that writes and imposes a new bascart policy on Bruno's in direct conflict with the express terms of the collective**

> **bargaining agreement was properly vacated.**

Id. at 1532 (emphasis supplied).

The reasoning of the *Bruno's* court applies with equal force in the present case. The CBA provides in art. IV, § 7 that the Company shall determine the employees' abilities, skills, and qualifications, subject to an employee's right to assert a grievance. 71 F.3d at 182, 184. This clause prohibited anyone except the Company, including the arbitrator, from evaluating an employee's skills. Accordingly, on the basis of this bald expropriation of power, the Fifth Circuit correctly set aside the award. *Id.*[11]

The Union correctly points out that "[a]ll that the Arbitrator did was consider the employee's contest of the

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[11] *See also Container Prods.*, 873 F.2d at 820 ("Because just cause for dismissal was found to exist, the arbitrator had no jurisdiction to assess an alternative remedy or impose a modification."); *S.D. Warren Co.*, 845 F.2d at 8 (holding that the arbitrator's substitution of the company's decision to discharge an employee with his decision to suspend the employee was a proscribed modification of the agreement); *Riceland Foods, Inc. v. United Bhd. of Carpenters and Joiners of Am., AFL-CIO-CLC, Local 2381*, 737 F.2d 758, 760 (8th Cir. 1984) ("Because the Arbitrator was not authorized to evaluate the propriety of the discipline selected by Riceland, the District Court should have granted summary judgment in favor of Riceland."), *cert. denied*, 471 U.S. 1102 (1985); *Butterkrust Bakeries v. Bakery, Confectionery & Tobacco Workers Int'l Union*, 726 F.2d 698, 700 (11th Cir. 1984) ("The issue submitted here was limited to whether there was just cause for Woodard's discharge. Therefore, once the arbitrator made a finding on this issue, his authority came to an end."); *Southern Council of Indus. Workers v. Bruce Hardwood Floors*, 784 F. Supp. 1345, 1349 (M.D. Tenn. 1992) ("An arbitrator cannot add his or her own procedural prerequisites under the guise of 'fundamental fairness' absent contractual authorization in the collective bargaining agreement.").

Company's determination of his 'ability, skill and qualifications', and conclude that the employee was right and the Company wrong." (Union's Pet. at 20-21.) However, this inquiry was outside the scope of the arbitrator's authority. As the Fifth Circuit concluded, "[n]othing in the Article II, Section 1 definition of 'a grievance' can be rationally interpreted to include the concept that a grievance includes a claim that an employee has been unfairly or incorrectly evaluated for lay off." 71 F.3d at 184.

If, as the Union claims, the CBA allowed employees to bring the Company's evaluations to an arbitrator for de novo review, the bargained-for language of the CBA giving the Company the right to evaluate employees for layoff would be superfluous. No layoffs can occur under the contract without an evaluation of the employees' relative abilities, skills, and qualifications. Because the decision to conduct a RIF rests with the business judgment of the Company, the Company would have the burden of performing the evaluations under any rational reading of the contract. In the absence of CBA language reserving to the Company the right to evaluate employees for layoff, an employee would presumably be able to assert a grievance merely over any disagreement with the Company's rating. That is the situation that the Union seeks to impose in the instant case even though the Company bargained for the CBA term giving it the right to assess employees' qualifications for layoff.

Fortunately, this is not the law. Rather, unless a CBA states that "all disputes between employers and employees" are arbitrable, "[t]his solution cannot be imposed in blanket fashion, however, so long as arbitration is consensual and the function of the court is to enforce a voluntary undertaking." Cox, 72 Harv. L. Rev. at 1507. Since the CBA circumscribed the arbitrator's authority in the

instant case, the arbitrator's usurpation of authority was undoubtedly subject to judicial review.

The Union also argues that the Fifth Circuit impermissibly infringed on the arbitrator's authority by "indulg[ing] in a fundamental interpretation of the Contract" under "the guise of determining the contractual authority of the Arbitrator."(Union's Pet. at 18.) As explained above, a court's ability to interpret a collective bargaining agreement's terms in order to determine and enforce the contractual limits of an arbitrator's authority is well-settled. *See Communications Workers*, 475 U.S. at 649; *John Wiley & Sons*, 376 U.S. at 346-47. To the extent the Union argues that the Fifth Circuit actually reviewed the merits of the arbitrator's award, this claim lacks merit. Nothing in the Fifth Circuit's opinion alters the substantive findings made by the arbitrator. The opinion does not comment on the questions of the contractual legitimacy of the evaluation procedure or the accuracy of the grievant's evaluation. Nor does the Fifth Circuit reach a conclusion regarding the possible outcome of a claim of discrimination. 71 F.3d at 184. The opinion clearly states that "[t]he sole issue before this Court is whether the arbitrator exceeded his authority under the collective bargaining agreement when he re-evaluated Thornal's qualifications and re-calculated his performance rating." *Id.* The only aspect of the award that the Fifth Circuit reviewed was the arbitrator's re-evaluation of the grievant-- an arbitrability issue clearly within the scope of the court's duty to enforce the limits on the arbitrator's authority.

D. The Arbitrator's Re-Evaluation of the Grievant on the Basis of Extra-Contractual Authority Fails to Draw its Essence from the Terms of the Agreement.

Alternatively, the arbitrator's violation of the "essence" test stems from his reliance on sources completely foreign to the CBA as the basis for his authority to reassess Thornal's skills. In particular, the arbitrator ignored the plain language of the CBA and instead applied the terms of wholly unrelated "Master Labor Agreement[s]" from the "federal public sector." 71 F.3d at 184; Union's Pet., App. 3, at 24-25. It is undisputed that neither the Company nor the Union agreed to abide by the terms of these other collective bargaining agreements. The arbitrator's explicit reliance on these foreign agreements serves as powerful evidence that the award violates the "essence" test. Moreover, although the differences between public and private employers and their unions are patent, pointing out these disparities amounts to an exercise in clairvoyance in this case since the terms of the collective bargaining agreements to which the arbitrator was referring (and on which he was apparently relying) are nowhere to be found in the record. By foisting his idiosyncratic brand of industrial justice upon the parties through his reliance on agreements wholly unrelated to the CBA at issue, the arbitrator betrayed his obligation to confine his role to interpretation and application of the CBA at hand. *Enterprise Wheel*, 363 U.S. at 597.

The applicable law holds that where an arbitrator fails to discuss a probative contract term and at the same time offers no clear basis for how he construed the contract to reach his decision without such consideration, an inference arises that the award was not based on the contract. *George A. Hormel & Co. v. United Food & Commercial*

Workers, Local 9, 879 F.2d 347, 351 (8th Cir. 1989); *see also Harry Hoffman Printing, Inc. v. Graphic Communications Int'l Union Local 261*, 950 F.2d 95, 98 (2d Cir. 1991) ("Where it is clear that the arbitrator *must* have based his award on some body of thought, or feeling, or policy, or law that is outside the contract (and not incorporated in it by reference), the arbitral award cannot stand.") (emphasis in original, quotation marks omitted). For instance, in a case where the arbitrator referred to an entirely separate labor agreement, "ignored relevant provisions of the National Agreement and the law of the shop, altered the issue for decision, and ruled for the Union based on 'the prevailing theory,' . . . [the arbitrator] was dispensing his own brand of industrial justice." *Trailways Lines, Inc. v. Trailways, Inc.*, 807 F.2d 1416, 1424 (8th Cir. 1986); *see also Harry Hoffman Printing*, 950 F.2d at 100 (vacating award because of reliance on unbargained-for due process right and stating that "uphold[ing] an arbitral decision that is predicated explicitly and exclusively on non-contractual concepts and that effectively imposes a condition not bargained-for by the parties would render the limiting sections of the CBA superfluous"). Similarly, in the instant case, the arbitrator ignored the relevant provisions of the CBA at issue and applied a totally different CBA, justifying vacatur by the Fifth Circuit.

An arbitration award is ripe for vacatur where "the arbitrator cannot be said to be 'even arguably construing or applying the contract [or] acting within the scope of his authority.'" *Georgia-Pacific Corp.*, 864 F.2d at 945 (quoting *Misco*, 484 U.S. at 36). The Union's assertion that the arbitrator was "applying the contract" when he concluded that he had the authority to sustain the grievance based on his conclusion that the Company's evaluation of Thornal was wrong is patently incorrect. (Union's Pet. at 21.) The award does not contain a single reference to art. II

of the CBA. As stated above, art. II creates the grievance and arbitration procedure that is the basis of arbitral authority, and it contains a "no alteration" clause, art. II, § 4. 71 F.3d at 182. Because the arbitrator did not even mention these limiting provisions, his award was not even plausibly a construction of the CBA. Other than a recitation of two contract provisions found in a preface to the award, references to the CBA that the arbitrator was supposed to be interpreting and applying were extremely rare.[12]

The arbitrator's breach of duty closely resembles the award at issue in *Harry Hoffman Printing*. There, the arbitrator sustained the grievances of employees who had been replaced while on strike. 950 F.2d at 97. Despite his finding that the employees engaged in unprotected activity that violated the agreement, the arbitrator concluded that their replacement was unjust because "elementary due process" required the company to provide the employees with notice of the legal consequences of their failure to report to work. *Id.* The court noted that even though some sections of the collective bargaining agreement could arguably provide some support for a notice requirement, the fact that these sections were totally ignored by the arbitrator required them to conclude that the basis for the arbitrator's decision was drawn "entirely from improper, extra-contractual sources, rather than from the CBA." *Id.* at 99.

In this case, the relevant portions of the CBA, which were ignored by the arbitrator, do not provide an arguable basis for the aggrandizement of his authority. The arbitrator refused to abide by the bargained-for limitations on his authority and chose instead to conjure up authority for his

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[12]Aside from the two contract provisions set out in the preface, the award mentions terms of the CBA only six times. (Union's Pet. App. 3.)

excursion by reference to his experience in arbitrations in the "federal public sector." 71 F.3d at 184. Clearly, the award was not based on explicit or properly implied terms, but rather was impermissibly based upon the arbitrator's particular notions of industrial justice. *Id.* (citing *St. Louis Theatrical Co. v. St. Louis Theatrical Bhd. Local 6*, 715 F.2d 405, 409 (8th Cir. 1983).

CONCLUSION

The Union argues that the Fifth Circuit exceeded its own authority by analyzing the CBA in determining whether the arbitrator exceeded his authority. However, under the decisions of this Court, "whether or not the Company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties." *John Wiley & Sons*, 376 U.S. at 547.

Next, the Union argues that the Fifth Circuit's enforcement of the CBA's limits on the arbitrator's authority was actually a pretext for its review of the arbitrator's findings on the merits. This allegation lacks any basis in fact. The Fifth Circuit's decision does not discuss the merits of the Union's claim that the Company's evaluation procedure violated the contract or opine as to what types of procedures are allowed under the contract. Nor does the opinion include a discussion of the possibility of the grievant making a successful discrimination claim, or even the accuracy of the arbitrator's re-evaluation of the grievant's abilities. The Fifth Circuit's decision rests on its conclusion that, under the express terms of the contract, the arbitrator lacked the authority to second-guess the Company's evaluation of Thornal's capabilities and perform his own re-evaluation.

Finally, the Union argues that the arbitrator's decision to re-evaluate Thornal's abilities is tantamount to the arbitrator's interpretation of the CBA's limits on his authority and can be reversed only if a court finds that the interpretation fails to draw its essence from the terms of the agreement. As stated above, the question of whether or not the parties agreed to arbitrate certain issues is a determination for the courts, which is to be made based on the terms of the agreement. However, even if one were to apply this deferential standard, the arbitrator's award shows that the basis for his decision to re-evaluate the grievant is found in the terms of a "Master Labor Agreement" used in the "federal public sector." Therefore, even with regard to the arbitrator's view of the scope of his authority, the decision fails to draw its essence from the terms of the agreement.

Because the Fifth Circuit's opinion faithfully adheres to the Supreme Court's prior holdings and because the Fifth Circuit correctly applied the bargained-for provisions of the CBA that limited the arbitrator's authority in this case, the Union's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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